Supreme Court U.S.
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No. 03-

In the Supreme Court of the United States

MOUNTAIN ENTERPRISES, INC.,

Petitioner,

v.

DANIEL R. FITCH AND GREGORY ADAM PLUMLEY, CO-ADMINISTRATORS OF THE ESTATES OF TYLER FITCH AND HARLEY FITCH, DECEASED, DANIEL R. FITCH, INDIVIDUALLY, JERRY GALLOWAY, INDIVIDUALLY AND D/B/A GALLOWAY'S TRUCKING, AND BILLY D. KIRK,

Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Lincoln County, West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Mountain Enterprises, Inc. ("Mountain"), entered into a contract with the State of West Virginia to pave a section of highway. Mountain hired an independent trucking company to transport asphalt from Mountain's asphalt plant to the job site. On one such trip, the truck's badly worn front tire blew out, causing a fatal collision with an oncoming passenger vehicle. According to the official who signed the contract on the State's behalf, a contractor such as Mountain is responsible for protecting the public safety only at the job site, and no prior statute, regulation, or judicial decision had indicated any broader responsibility. The trial court, however, held that the contractor's duty extended to ensuring the safe transportation of materials to the job site and upheld the imposition of $12 million in punitive damages for the alleged breach of this duty. The following question is presented:

Whether the Due Process Clause of the Fourteenth Amendment permits the imposition of punitive damages for violation of a newly-announced duty of care of which the defendant lacked prior notice.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED AND RULE 29.6 STATEMENT

Petitioner Mountain Enterprises, Inc. ("Mountain"), which does business as Lenore Asphalt, Inc., states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock. Mountain was a defendant in the Circuit Court of Lincoln County, West Virginia.

Two other parties, Jerry Galloway (individually and doing business as Galloway's Trucking) and Billy D. Kirk, were Mountain's co-defendants in the Circuit Court of Lincoln County. Because these parties have not filed petitions for a writ of certiorari, they are deemed respondents in this Court. S. Ct. R. 12.6.

The plaintiffs in the Circuit Court of Lincoln County (and respondents in this Court) were Daniel R. Fitch and Adam Plumley, as co-administrators of the Estates of Harley Fitch and Tyler Fitch, deceased, and Daniel R. Fitch, individually.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mountain Enterprises, Inc. ("Mountain"), respectfully petitions for a writ of certiorari to review the judgment of the Circuit Court of Lincoln County, West Virginia, in this case.

OPINIONS BELOW

The Circuit Court of Lincoln County held that punitive damages could be imposed upon Mountain for its alleged ratification of the misconduct of the trucking company Mountain hired to transport asphalt from Mountain's plant to a highway paving site (App. 17a, 21a, *infra*). Later, in instructing the jury, it ruled that punitive damages could also be imposed upon Mountain based upon its own actions or failure to act in violation of a supposed duty to protect the public safety beyond the bounds of the job site (App. 25a-26a, *infra*). The court amplified its reasoning in an order denying Mountain's post-verdict motions (App. 78a, *infra*). The Supreme Court of Appeals of West Virginia denied Mountain's petition for appeal in an unpublished order (App. 125a, *infra*).[1] Mountain's motion for reconsideration of that order was similarly denied (App. 127a, *infra*).

JURISDICTION

The Supreme Court of Appeals denied Mountain's petition for appeal by a summary order entered on October

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[1] Mountain is filing simultaneously with this petition a petition for a writ of certiorari to the West Virginia Supreme Court of Appeals respecting that court's denial of Mountain's petition for appeal. See Petition in *Mountain Enters.* v. *Fitch*, No. 03-__, at i (presenting question whether the Due Process Clause of the Fourteenth Amendment is violated by West Virginia's failure to afford civil litigants at least one appeal as of right to review judgments that award substantial compensatory and/or punitive damages).

29, 2003, which let stand a final judgment against Mountain that had been entered on February 1, 2002, by the Circuit Court of Lincoln County, West Virginia. The Supreme Court of Appeals denied Mountain's motion for reconsideration by an order entered on January 16, 2004. This Court has jurisdiction to review the Circuit Court's judgment under 28 U.S.C. § 1257(a). On January 21, 2004, Chief Justice Rehnquist granted an extension of the time within which Mountain must file its petition for a writ of certiorari, to and including February 26, 2004.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property without due process of law * * *."

STATEMENT

1. This case arose from an April 23, 1999 collision between an asphalt-carrying truck owned by Jerry Galloway and driven by Billy Kirk and an oncoming Lincoln Town Car. The collision killed the Town Car's driver, Leigh Poindexter, and her two children, Tyler and Harley Fitch. *E.g.*, 5/31/01 Tr. 90, 97, 98, 102, 107. The trucking company had been hired by Mountain to transport asphalt from Mountain's asphalt plant to a portion of highway in Lincoln County, West Virginia that Mountain was paving pursuant to a contract with the State. *E.g.*, 6/19/01 Tr. 102, 105.

The representatives of the minor victims brought suit against Kirk, Galloway, and Mountain in the Circuit Court of Lincoln County.[2] At the jury trial, which began on June 28,

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[2] The Estate of the deceased driver of the Town Car, Leigh Poindexter, brought a separate action against the same three defendants, which was settled. Under the settlement, Mountain paid $1,700,000 to Poindexter's Estate.

2001 and lasted several weeks, the cause of the accident was basically undisputed. The truck's left front tire was badly worn and blew out, *e.g.*, 6/6/01 Tr. at 49, causing the truck to swerve over the center-line of the road, *e.g.*, *id.* at 81-82, and collide with, tip over, and land on top of the Town Car, *e.g.*, *id.* at 84. Similarly undisputed was the liability of Galloway (the truck's owner) and Kirk (the driver).

2. Mountain, on the other hand, steadfastly argued that it was not responsible for the truck's condition and that it bore no legal responsibility for the victims' deaths. It was undisputed that, prior to the accident, Mountain had no knowledge that Galloway or Kirk had been involved in any accidents or had been cited for violations of any motor vehicle laws. *E.g.*, 6/14/01 Tr. at 181 (testimony of Rick Johnson, Mountain's area manager, that Mountain never had any problems in the past with any of Galloway's drivers and that Mountain was unaware of any problems with Galloway's trucks other than minor mechanical ones); *id.* at 174 (testimony of Mountain's expert, David Stopper, that prior to this accident, Galloway had no record of any violations).

Mountain similarly lacked prior notice of the unsafe condition of the tire on the truck that caused the accident. *E.g.*, 6/14/01 Tr. at 39, 106-07 (testimony of Mountain's employees at the asphalt plant that they did not see the condition of the tire before the truck left the plant); 6/4/01 Tr. at 181 (similar testimony by plaintiffs' expert Gary Huey that "there is nothing that indicates that they [Mountain] were aware of [the condition of the tires before the day of the accident]"). Although the Circuit Court suggested that Mountain might have had actual, prior knowledge of the tire's condition, the court's surmise is belied by the record. The court pointed to evidence that a Mountain employee, Erma Collier, allowed Kirk to borrow her cell phone, which Kirk used to call Galloway to inform him of the bald condition of the tire. The court then suggested that the jury might have found that Collier overheard the Kirk-Galloway

phone conversation. App. 48a, *infra*. The court's recollection of the evidence is inaccurate, however. Collier's testimony on the witness stand that (1) she did not overhear the conversation (6/22/01 Tr. at 8, 15), and (2) that she had no opportunity to see the condition of the tires from her position across the road from where the truck was parked (*id.* at 14), went unrebutted. Moreover, Kirk testified that his attempt to call Galloway was unsuccessful due to a lack of cell phone reception in the area. 6/15/01 Tr. at 82-83.

Like other paving contractors, Mountain did not conduct routine inspections of carriers' trucks or drivers before the trucks departed from the asphalt plant with a full load. 6/14/01 Tr. at 195-97. Mountain followed the settled industry view, endorsed by the State official who had signed the contract on the State's behalf, that the paving contractor's legal responsibility to protect the safety of the public existed only at the project site, not on the public roads leading to that site. 6/6/01 Tr. at 132-34. See also 6/21/01 Tr. at 180 (truck driver Charlie White's testimony that shippers did not customarily inspect trucks hired to transport goods).

3. Mountain moved for summary judgment on liability for compensatory damages, arguing that it had not itself engaged in any culpable conduct and could not be held vicariously liable for Galloway's or Kirk's acts because Galloway's trucking company, which was not owned, controlled, or operated by Mountain, was an independent contractor. The trial court denied the motion, holding that Mountain was precluded from asserting the independent-contractor defense by each of three supposed exceptions to the defense: (1) Mountain was performing inherently dangerous work; (2) Mountain was performing work requiring a franchise from a public authority and involving an unreasonable risk of harm to others; and (3) Mountain's contract with the State imposed upon Mountain a non-delegable duty to protect the safety of the public not only at the job site itself but in the transportation of materials to and

from that site by independent contractors. App. 1a, 12a-13a, *infra*. The trial court rejected Mountain's arguments as to why these exceptions were inapplicable, and submitted the question of Mountain's liability for compensatory damages to the jury with an instruction that Mountain ***must*** be held vicariously liable for any culpable acts committed by Galloway or Kirk. App. 25a, *infra*.

Prior to that ruling, there had been no statute, regulation, or judicial decision finding or declaring that paving contractors are contractually or otherwise subject to a duty to protect the public safety beyond the project, much less how that duty might translate to equipment owned, operated, and controlled by an independent contractor. Indeed, the only guidance then available indicated to Mountain that it had no such duty: As the Head of the Contract Administration Division for the West Virginia Division of Highways explained in Mountain's offer of proof (which the court excluded on the ground that the contract was unambiguous), the Division of Highways construed the contract as requiring Mountain to ensure public safety only at the project site, not the public roads leading to that site. 6/6/01 Tr. at 132-34.[3]

Related to the trial court's ruling on the third supposedly applicable exception to the independent-contractor defense (a non-delegable duty), the court held, as noted, that the contract between Mountain and the State was unambiguous in imposing upon Mountain a duty to protect public safety not only at the job site, but also between Mountain's asphalt plant and the job-site. App. 13a, *infra*. As shown below (at

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[3] The court refused to allow this evidence to be presented to the jury, ruling that Mountain's contract with the State was unambiguous and therefore that the parol evidence rule precluded extrinsic evidence of the contract's meaning. 6/15/01 Tr. at 14. (Of course, for punitive damages purposes at least, the question was not what the contract objectively meant, but what Mountain and the State understood it to mean.)

pp. 12-14, *infra*), the court's injection of a duty into the contract lacks even a colorable foundation and would not in any event provide a basis for overcoming the due process complaint asserted by Mountain.

4. It was not until its instructions to the jury that the court for the first time ruled, over Mountain's objections, that a ***punitive*** award could be assessed against Mountain based upon its breach of this newly-minted duty to protect the public safety beyond the job site. App. 25a-26a, *infra*. The court had earlier made a related ruling that punitive damages could be imposed upon Mountain based upon its alleged ratification of the trucking company's misconduct. App. 17a, 21a, *infra*. The jury entered the figure of $6,000,000 on the verdict form as punitive damages on each of the two overlapping theories of liability; as construed by the court, this constituted a $12,000,000 punitive award against Mountain. App. 34a, *infra*.

Mountain then moved, *inter alia*, for judgment as a matter of law on punitive liability. It argued that federal due process countenances only the imposition of compensatory, not punitive, damages for violation of a duty that had not previously been clearly established and sought vacatur of the punitive award on that ground. The court denied the motion. App. 78a, *infra*. The court neither addressed Mountain's due process argument nor attempted to show that the alleged duty had been previously established, stating only that Mountain's duty was grounded in the court's sense of "law as well as public policy." App. 86a, *infra*.

5. Mountain then filed a petition for appeal to the Supreme Court of Appeals of West Virginia. The petition reprised several of the arguments that had been made to (and rejected by) the Circuit Court, including the aforementioned federal due process argument. On October 29, 2003, the Supreme Court of Appeals refused to hear Mountain's appeal, stating only that "[u]pon consideration whereof, the

Court is of the opinion to and doth hereby refuse said petition for appeal." App. 126a, *infra*.

On November 6, 2003, Mountain moved for reconsideration of that order. The court, again without explanation, denied this motion by order entered January 16, 2004. App. 127a, *infra*.

REASONS FOR GRANTING THE PETITION

Although our legal system contemplates judicial announcement of new legal principles and tolerates the imposition of compensatory damages based thereon, punitive damages are another matter entirely. Because they impose punishment (financially and reputationally), they trigger special fairness concerns under the Fourteenth Amendment's Due Process Clause. Thus, this Court has made clear that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment * * *." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996). And numerous courts, including this Court, have applied this principle to hold that punitive damages may not be imposed based upon a defendant's violation of a newly announced duty of care.

The court below ignored this rule entirely in allowing the jury to impose punitive damages on Mountain based on its alleged violation of a newly announced duty to ensure the public safety outside the bounds of the paving project site. Prior to the Circuit Court's decision, there was no West Virginia judicial determination, statute, or regulation finding or declaring that paving contractors are contractually or otherwise subject to a duty to protect the safety of the public beyond the project site, much less how that duty might translate to equipment owned, operated, and controlled by an independent contractor. (Nor did Mountain's contract provide such guidance, given its ambiguity, which we

discuss below at pp. 12-14, *infra*.) Indeed, the only guidance then available indicated that there was no such duty.

Because the decision to permit imposition of punishment despite the absence of a violation of any clearly discernible legal duty is so clearly contrary to the uniform approach of other courts, including this Court, summary reversal is appropriate.

I. DUE PROCESS DOES NOT COUNTENANCE IMPOSITION OF PUNITIVE (AS OPPOSED TO COMPENSATORY) DAMAGES FOR VIOLATION OF A NEWLY ANNOUNCED DUTY OF CARE.

As noted, this Court in *BMW* reaffirmed that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment * * *." 517 U.S. at 574. To illustrate the point, the Court cited *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). See *BMW*, 517 U.S. at 574 n.22. Though *Bouie* was a criminal case, this Court explained that its teachings apply equally to civil cases involving punitive damages because "the basic protection against judgments without notice afforded by the Due Process Clause is implicated by civil *penalties*." *Ibid.* (internal quotation marks and citation omitted; emphasis in original).

In *Bouie*, the defendants, two African-American college students, sat down in a booth at a lunch counter in a South Carolina drug store; "[t]here was no evidence that any signs or notices were posted indicating that Negroes would not be served [at the lunch counter]." 378 U.S. at 348. The defendants were asked to leave but refused, and subsequently were prosecuted for criminal trespass under a statute proscribing "'entry upon the lands of another * * * after notice from the owner or tenant prohibiting such entry * * *.'" *Id.* at 349 (quoting statute) (alterations in original).

This statute did not by its terms apply to their conduct because there had been no notice ***before*** they entered the lunch counter. *Id.* at 350. In affirming the convictions, however, the South Carolina Supreme Court construed the statute "to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." *Id.* at 350.[4] This Court held that such retroactive application of a novel construction of a statute violates the Due Process Clause: "While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal." *Id.* at 362.

In *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), this Court, while not citing *BMW*, effectively observed that the *Bouie* principle applies equally in the context of punitive damages imposed in civil cases. Interpreting Title VII's standard for imposition of punitive damages, the Court emphasized that among the "circumstances where intentional discrimination does not give rise to punitive damages liability * * * [is where] [t]he underlying theory of discrimination [is] novel or otherwise poorly recognized." *Id.* at 536-37.

The state and lower federal courts too, with the exception of the decision below, have uniformly followed this same approach. In *Nees* v. *Hocks*, 536 P.2d 512 (Or. 1975), for

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[4] More precisely, the South Carolina Supreme Court announced the novel construction in a contemporaneous case, *City of Charleston* v. *Mitchell*, 123 S.E.2d 512 (S.C. 1961), and simply relied on *Mitchell* in affirming the *Bouie* defendants' convictions. See 378 U.S. at 350 n.2. *Mitchell* was decided by the South Carolina Supreme Court ***after*** the *Bouie* defendants engaged in the conduct for which they were convicted. *Ibid.* This Court also reversed the judgment in *Mitchell*. *Ibid.* (citing 378 U.S. 551).

example, the Oregon Supreme Court for the first time recognized a cause of action by an at-will employee for retaliatory discharge based on a "socially undesirable motive." *Id.* at 515. (The defendant had discharged the plaintiff after she performed jury duty, which caused a temporary absence from her job. *Id.* at 513.) The court overturned the punitive damages award, however, explaining: "If we held that punitive damages could be awarded in the present case we would be permitting the jury to punish defendants for conduct which they could not have determined beforehand was even actionable." *Id.* at 517.

Other state courts have similarly adopted this reasoning in recognizing the tort of retaliatory discharge while holding that imposition of punitive damages for commission of the tort must await future cases. The Illinois Supreme Court in *Kelsay* v. *Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978), provided the most comprehensive explanation of this principle (*id.* at 360):

> [T]he function of punitive damages is similar to that of a criminal penalty, *i.e.*, as a punishment to the wrongdoer and as a means to deter such a wrongdoer and others from committing like offenses in the future. Because of their penal nature, punitive damages are not favored in the law, and the courts must take caution to see that punitive damages are not improperly or unwisely awarded. Adherence to this rule compels us to conclude that punitive damages should not be awarded where, as here, the cause of action forming the basis for their award is a novel one.

See also, *e.g.*, *Hansen* v. *Harrah's*, 675 P.2d 394, 397 (Nev. 1984); *Murphy* v. *City of Topeka-Shawnee County Dep't of Labor Servs.*, 630 P.2d 186, 193 (Kan. Ct. App. 1981) ("[I]nasmuch as this is the first recognition of such a cause [of action] by a Kansas court of appellate jurisdiction, we

believe the allowance of punitive damages in this case would be extremely unjust.").

This principle is hardly unique to the tort of retaliatory discharge. In *Strickland* v. *Motors Insurance Corp.*, 970 F.2d 132 (5th Cir. 1992), for example, the plaintiff was an insured whose car insurance policy was about to expire. The defendant insurer failed to provide the plaintiff notice of the looming expiration, as required by Mississippi statute. The policy expired, the plaintiff was involved in an accident, and the defendant denied coverage. In defending the plaintiff's suit to establish coverage, the defendant contended that the plaintiff had received constructive notice of the expiration and therefore actual notice was not required by the statute. The Fifth Circuit rejected the argument, holding that actual notice was always required under the statute. The court held, however, that punitive damages were not appropriate because "the statutory language here is less than clear * * *." *Id.* at 137.

There are a multitude of similar cases from state and federal courts. See, *e.g.*, *McFarland* v. *Utica Fire Ins. Co. of Oneida County*, 814 F. Supp. 518, 527 (S.D. Miss. 1992) (accepting plaintiff's interpretation of ambiguous provision in insurance policy and awarding compensatory damages, but denying request for punitive damages because "[t]here is no case directly on point in Mississippi which purports to interpret the thrust of defendant's intentional acts exclusion clause" and the defendant therefore "had an arguable basis to deny plaintiff's claims"); *Harrison* v. *Allstate Ins. Co.*, 662 So. 2d 1092, 1095 (Miss. 1995) (punitive damages unwarranted because "[t]he issue presented in this case is one of first impression in this state"); *Larr* v. *Minnesota Mut. Life Ins. Co.*, 924 F.2d 65, 67 (5th Cir. 1991) (similar); *Dunn* v. *State Farm Fire & Cas. Co.*, 711 F. Supp. 1362, 1365 (N.D. Miss. 1988) (similar); *Silberg* v. *California Life Ins. Co.*, 521 P.2d 1103, 1110 (Cal. 1974) (similar).

II. THE PRINCIPLE THAT PUNITIVE DAMAGES MAY NOT BE IMPOSED BASED UPON VIOLATION OF A NEWLY ANNOUNCED DUTY OF CARE WAS VIOLATED IN THIS CASE.

Prior to the Circuit Court's ruling in this case, there was no judicial determination, statute, or regulation finding or declaring that paving contractors are contractually or otherwise subject to a duty to protect the public safety beyond the project site, much less how that duty might translate to equipment owned, operated and controlled by independent contractors. The Circuit Court essentially admitted that this was so when, in responding to Mountain's argument against imposition of punitive damages on this basis, it identified no such authority and stated only: "It seems clear to the Court, both as a matter of law as well as public policy, that if a company is going to make profits by exerting a substantial degree of control over some aspects of business, it correspondingly acquires a clear legal and public policy-based duty to ensure that that aspect of business is conducted safely." App. 86a, *infra*.

Nor did Mountain's contract with the State provide any greater notice of the supposed duty to protect the public safety beyond the bounds of the project site than the South Carolina trespass statute in *Bouie* provided notice of a duty not to enter the drug store and seek service at its lunch counter. As an initial matter, a contractually-imposed duty could not possibly have provided Mountain fair notice that a punitive award might attach to its violation, since the West Virginia Supreme Court of Appeals has clearly held that "generally, punitive damages are unavailable in a breach of contract action * * *." *C.W. Dev., Inc.* v. *Structures, Inc.*, 408 S.E.2d 41, 45 (W. Va. 1991) *(per curiam)*.

In any event, under any fair reading, the contract confined Mountain's duty to the job site itself; certainly, the contract language (and the Specifications it incorporates)

were at best ambiguous on the matter and failed entirely to provide Mountain with any clear notice of its supposed duty.

The Circuit Court focused on Section 107.7 of the Specifications (see App. 8a, *infra*), which provides in relevant part:

> The Contractor shall at all times so conduct their [sic] work as to assure the least possible obstruction to traffic. The safety and convenience of the general public and the residents along the highway and the protection of persons and property shall be provided for by the contractor as specified under 104.5.
>
> The Contractor shall comply with all applicable Federal, State, and local laws governing safety, health and sanitation. The Contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions, on their [sic] own responsibility, or as the Engineer may determine, reasonable [sic] necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

West Virginia Department of Transportation, Division of Highways, Standard Specifications Roads and Bridges §107.7 (1993).

The Circuit Court quoted just the second paragraph, which appears to address only compliance with "Federal, State, and local laws governing safety, health and sanitation," and thus appears to require "safeguards * * * [and] any other needed actions" only insofar as necessary to comply with such laws. Yet the Circuit Court did not cite a single "Federal, State, and local law[]," only the Specifications. See App. 7a-9a, *infra*. Accordingly, it cannot fairly be said that this second paragraph ***itself*** imposes any clear duty to

protect the public safety beyond the bounds of the project site.

At the same time, the first paragraph of Section 107.7, which the Circuit Court ignored entirely, distinctly indicates that the Contractor's duty to protect the public safety extends only to the project site. That paragraph requires that the Contractor protect "[t]he safety and convenience of the general public * * * ***as specified under 104.5***" (emphasis added). Section 104.5 in turn speaks clearly, and solely, to "[t]he ***Project***," which the Contractor must keep "open to all traffic * * * in such condition that both local and through traffic will be safely accommodated" (emphasis added). And "Project" is clearly defined to mean "[t]he specific section of the highway, together with all appurtenances and construction to be performed, under the Contract" (§ 101.62) — that is, the job site, and not any roads that may lie between the job site and the asphalt plant.

Beyond this contractual language, the only guidance available to Mountain and other paving contractors prior to the Circuit Court's decision in this case suggested that contractors bore a duty to protect public safety only at the job site. The State official who signed the Mountain contract on behalf of the State, Robert Tinney, testified in his deposition as to his understanding of the scope of a contractor's duty:

> Q. If the accident occurred outside of the project area, on a part of the road which was not being resurfaced, that would not fall within the duties and responsibilities of the contractor, just look at those specifications?
>
> A. Pursuant to the specifications it's talking about the limits of the project, the limits of the project by the two (2) miles or so that they were resurfacing.

6/6/01 Tr. 132-33 (quoting Tinney Deposition). Thus, here, as in the Illinois Supreme Court's *Kelsay* case, "there was

authority which would have reasonably caused the defendant to conclude that its conduct was not actionable." 384 N.E.2d at 360.

Notwithstanding the manifest absence of clear notice — or, indeed, any real notice — of any duty, and notwithstanding Mountain's timely and clear presentation of the constitutional principle on which this petition rests, the Circuit Court permitted the jury to impose punitive damages based upon Mountain's violation of this supposed duty. The court entirely ignored Mountain's legal argument, failing to discuss or even acknowledge any of the case law cited by Mountain. (The Supreme Court of Appeals declined, without explanation, even to consider this issue when Mountain petitioned to have its appeal heard. App. 125a, *infra*.) The Circuit Court thus clearly departed from a well-settled federal due process principle, offering only a transparently pretextual justification for its ruling. Its judgment accordingly should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Circuit Court of Lincoln County summarily reversed.

Respectfully submitted.

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FEBRUARY 2004

APPENDIX

APPENDIX A

[TRIAL COURT ORDER ON DECLARATORY JUDGMENT AND SUMMARY JUDGMENT]

[UNPUBLISHED]

IN THE CIRCUIT COURT OF LINCOLN COUNTY,
WEST VIRGINIA

DANIEL R. FITCH and GREGORY ADAM PLUMLEY, Co-Administrators of the Estates of Harley Fitch and Tyler Fitch, deceased, and DANIEL R. FITCH, Individually,

Plaintiffs,

v. CIVIL ACTION NO. 99-C-86

MOUNTAIN ENTERPRISES, INC., d/b/a LENORE ASPHALT, INC., a Kentucky Corporation, JERRY GALLOWAY, individually, and d/b/a GALLOWAY'S TRUCKING, and BILLY D. KIRK,

Defendants.

ORDER ON DECLARATORY JUDGMENT AND SUMMARY JUDGMENT

On the 22nd day of September, 2000, came the respective parties by counsel, pursuant to the prior order of this Court setting this matter for hearing at this time and term on the Defendant, Mountain Enterprises, Inc.'s Motion for Summary Judgment, in accordance with the applicable provisions of Rule 56© of the West Virginia Rules of Civil

Procedure (WVRCP), and the Plaintiffs for Motion For Declaratory Judgment, in accordance with the applicable provisions of WVRCP Rule 57, and West Virginia Code §55-13-1 et seq. Present were Plaintiff, William E. Poindexter, Administrator of the Estate of Leigh Ann Poindexter, by Michael J. Del Giudice of the firm of Ciccarello, Del Giudice and LaFon; plaintiff, Daniel R. Fitch, Administrator of the Estates of Tyler Fitch and Harley Fitch, and Daniel R. Fitch, individually, by H. Truman Chafin, of The H. Truman Chafin Law Firm, PLLC; Mountain Enterprises, Inc., d/b/a Lenore Asphalt, Inc., a Kentucky corporation ("Mountain"), by Mary H. Sanders, of Huddleston, Bolen, Beatty, Porter & Copen, LLP and Defendant Billy D. Kirk ("Kirk") by Hannah Curry of Kay, Casto & Chaney, PLLC.

DISCUSSION OF THE FACTS AND THE LAW

This matter is being litigated based upon the Plaintiffs numerous claims for compensation and damages as a result of the deaths of three people on State Route 10 near West Hamlin, which is situate in Lincoln County, West Virginia, and which was allegedly proximately caused by various acts or omissions by the named Defendants. The driver, Defendant Billy D. Kirk, during the course of his employment with Defendant, Galloway's Trucking, owned by Defendant Jerry Galloway, experienced a blow out of his truck tire, subsequently lost control of the truck carrying a full load of asphalt ("hot mix") striking the decedents' vehicle and killing the three persons contained therein, for which Defendant Billy D. Kirk plead guilty to the crime of "negligent homicide", and for which Defendant Jerry Galloway is currently being prosecuted for the crime of "negligent homicide".

Given the alleged acts or omissions by the respective parties, and the alleged legal duties owed/not owed or breached/not breached by the Defendants, the respective

parties have at the completion of relevant discovery each filed Motions for the Court to determine certain duties, or the lack of duties, breach or the lack of breach of those duties by the respective parties. This has been accomplished by the respective fling of Motions for declaratory Judgment and Motions for Summary Judgment.

In that respect, the standard for the granting of a Declaratory Judgment is referenced in WVRCP Rule 57, but expressly outlined in West Virginia Code §55-13-1, et. seq., particularly Section 2 which, states in relevant part:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordnance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Specifically, our Supreme Court has held that the purpose and advantage of securing a Declaratory Judgement is to avoid the expense and delay which might otherwise result, and in securing in advance a determination of legal questions which, if pursued, can be given the force and effect of a judgment or degree without the long and tedious delay which might accompany other types of litigation (see Crank v McLaughlin, 125 W.Va. 126 (1942); see also Harrison v Town of Eleanor, 191 W.Va. 611 (1994).

In regard to any Motion for Summary Judgment filed in such a case as the present one, the standard for granting or denying such relief is set faith in the express language of Rule 56© of the West Virginia Rules of Civil Procedure. In interpreting the test set forth in Rule 56(c), the Supreme Court has ruled:

> The test for whether a motion for summary judgment should be granted is essentially the same as the "rather restrictive standard" applied when ruling on motions for judgment on the pleadings. A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Gunn v. Hope Gas, Inc., 402 S.E.2d 505 (W.Va. 1991).

Further, the Court has held recently that the burdens of proof in attempting to meet this test are allocated between the moving party(s) and opposing party(s), respectively, as follows:

> A. Burden of the Moving Party:
>
> A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such summary judgment. Smith v. Sears, Roebuck & Co, 447 S.E.2d 255 (W.Va. 1994). Although, on a motion for summary judgment, an adverse party may not rest upon the mere allegations or denials of his pleadings, the moving party still will not be entitled to summary judgment unless the record demonstrates he has met his initial burden of establishing that there is no genuine issue as to any material fact. Ramey v. Ramey, 180 W.Va. 230 (1990).
>
> B. Burden of the Opposing Party:
>
> When the moving party presents depositions, interrogatories or affidavits or otherwise indicates there is no genuine issue as to any material fact, the resisting party to avoid summary judgment must

> present some evidence that the facts are in dispute. Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W.Va. 1995) . . . by offering more than a "scintilla of evidence" . . . sufficient for a reasonable jury to find in a non-moving party's favor. Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994).

The Supreme Court has more recently, however, provided another facet for the Court to consider by the issuance of Fayette County National Bank v. Gary C. Lilly, et al, 199 W.Va. 499 (1997). In the Lilly case, the Court held as follows in the first two syllabus points:

> 1. A motion for summary judgment should be granted only when (a) it is clear that there is no genuine issue of fact to be tried and (b) inquiry concerning the facts is not desirable to clarify the application of the law [inserted letters supplied]. Cited from Syl. Pt. 3, Aetna Casualty & Surety Co. v Federal Ins. Co. of N.Y., 148 W.Va. 160 (1963);
>
> 2. Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56© is simply one half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trial worthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that had the capacity to sway the outcome of the litigation under the applicable law. Cited from Syl. Pt. 5, Jividen v. Law, 194 W.Va. 705 (1995).

When viewed synoptically through the course of the respective parties discovery process, the Court has entertained the Motions for Declaratory Judgment and Summary Judgment, based upon the relative evidence adduced thus far, the applicable legal principles and within

the context of argument by counsel. In response to all of which, the Court following its review and consideration of the entire record, including the proposed orders by the respective parties, has determined that the motions are now ripe for a decision, particularly in light of the Plaintiffs WVRCP Rule 37 Motion to Deem Admitted Plaintiff's Request for Admissions of Defendant Mountain.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

UPON MATURE CONSIDERATION OF ALL OF WHICH, including the Court's review of the entire record within the context of the arguments in support of, and in opposition to, the requested relief by the parties, the Court does hereby make the following findings of fact and conclusions of law:

(1) That this Court has statutory and rule based jurisdiction and venue over the subject matter and the parties, in accordance with the applicable provisions of West Virginia Code, §56-1-1 and §55-13-1, et. seq., together with Rule 56© and Rule 57 of the West Virginia Rules of Civil Procedure; and,

(2) That the Court does hereby approve and adopt the relevant facts and legal principles set out in the previous section entitled "Discussion of the Facts and the Law"; and,

(3) That in regard to the underlying factual basis of the Court's determinations hereinafter set forth, the Court hereinafter expressly finds as follows:

(4) That Leigh Ann Poindexter, Tyler Fitch and Harley Fitch were killed on April 23, 1999, in Lincoln County, West Virginia when the vehicle in which they were riding was struck by a truck owned by Galloway being driven by Kirk and hauling hot mix asphalt owned by Mountain; and,

(5) That the accident occurred because, among other reasons, the Galloway truck suffered a blow out of a dangerously bald tire; and,

(6) That the Galloway truck was hauling hot mix asphalt for defendant Mountain from Mountain's Plant No. 34 to a job site on which Mountain was the contractor with the State of West Virginia Department of Transportation, Division of Highways ("DOT"); and,

(7) That hot mix asphalt is a toxic substance of great weight (approximately 2,000 pounds per cubic yard) and has a temperature in excess of 300 degrees Fahrenheit when being transported; and,

(8) That at the time of the accident, Mountain had a contractor's license with the State of West Virginia thus enabling it to enter into a Contract with the DOT to provide all labor and materials necessary to complete a paving project from Midkiff to Branchland in Lincoln County, West Virginia ("Contract"); and,

(9) That the Contract entered into by and between Mountain and the DOT states in part at Paragraph 4:

> **(4) Contractor agrees to conform to the laws of the State of West Virginia** in reference to keeping the project open, and to all other legal requirements not mentioned herein, or specified; to keep all employees engaged on said work protected by worker's compensation find in compliance with the act of the legislature of West Virginia, known as the Worker's Compensation Act, which is made a part hereof **and to save the department harmless from all liability for damage to persons or property that may accrue during and by reason of sets of negligence of the contractor, his agents, employees, or subcontractors if there be such. [Emphasis added]**

(10) That said Contract incorporates by reference, the West Virginia Department of Transportation, Division of Highways Standards and Specifications, Roads and Bridges ("Specifications"); and,

(11) That pertinent portions of said Specifications state as follows:

> Section 108.1 – SUBLETTING OF CONTRACT:
>
> **"No subcontracts or transfer of contract, shall in any case release the Contractor [Mountain] of their liability under the Contract and Bonds."**
>
> Section 107.7 – PUBLIC CONVENIENCE AND SAFETY:
>
> **"provide all safeguards, safety devices and protective equipment and take any other needed actions, on their own responsibility, or as the Engineer may determine, reasonable[sic] necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the Contract. . ."**
>
> Section 101.62 – PROJECT:
>
> **"The specific section of the highway, together with all appurtenances and construction to be performed, under the Contract."**
>
> Section 101.97 – WORK:
>
> **"Work shall mean the furnishing of all labor, materials, equipment, and other incidentals necessary or convenient to the successful completion of the project and the carrying out of all duties and obligations imposed by the contract."**

Section 104.1 – INTENT OF CONTRACT:

"The intent of the Contract is to provide for the construction and completion in every detail of the work described. The contractor shall furnish all labor, materials, equipment, tools, transportation, and supplies required to comply to complete the work in accordance with the Plans, Specifications and terms of the Contract.

Should any misunderstanding arise as to the intent or meaning of the Contract, or any discrepancy appear, the decision of the Commissioner shall be final."

Section 105-13 – LOAD RESTRICTIONS:

"The contractor shall comply with all legal load restrictions in the hauling of materials on public roads... In no case shall legal load limits be exceeded unless permitted in writing . . ."

Section 107.1 – LAWS TO BE OBSERVED:

"The Contractor shall keep fully informed of all Federal and State laws, all local laws, ordinances, and regulations and all orders and decrees of bodies or tribunals having any jurisdiction or authority, which in any manner affect those engaged or employed on the work, or which in any way affect the conduct of the work. The Contractor shall at all times observe and comply with all such laws, ordinances, regulations, orders and decrees; and shall protect and indemnify the state and its representatives against any claim or liability arising from or based on the violation of any such laws, ordinances, regulations, orders, or decrees, whether by themselves, their subcontractors or their employees.

(12) That Galloway has been hauling hot mix asphalt for Mountain since 1994 and did so continuously until the date of the accident; and,

(13) That Galloway hauled almost exclusively for Mountain; and,

(14) That during the period of time that Galloway hauled hot mix asphalt for Mountain, Mountain had the right and opportunity to inspect Galloway's trucks, vehicle maintenance records, vehicle inspection records and personnel records; and,

(15) That while Mountain argues it had no duty to do so, during the period of time that Galloway hauled hot mix asphalt for Mountain, Mountain never inspected Galloway's trucks, never reviewed any maintenance or inspection records of said trucks, never reviewed personnel files of the drivers, nor did it do anything else to determine whether said trucks were safe to haul hot mix asphalt on the roads of West Virginia; and,

(16) That Mountain had the right to terminate Galloway's services at any time; and,

(17) That Mountain unilaterally determined the price that Galloway would receive for hauling hot mix asphalt; and,

(18) That although disputed by Mountain, there is evidence that Mountain dictated when Kirk was to report to work each day, where he was to report, whom he was to haul the hot mix asphalt, how much hot mix asphalt he was to haul, when he was to stop work at the end of the day, and the route that he was to take to the project site; and,

(19) That Mountain had the right to refuse to load Galloway's trucks if they were unsafe; and,

(20) That considering the condition of the front steering tires on the truck, said truck was patently dangerous, which

would have and should have been obvious to anyone in near proximity to the truck; and,

(21) That although Mountain argues it had no duty, there is further evidence to indicate that Mountain made no efforts to insure the safety of the public during the work under the DOT Contract; and,

(22) That there is further evidence to indicate that Mountain attempted to utilize its own trucks at one time, however, discontinued such practice because it was not economical; and,

(23) That West Virginia Code, § 17C-17-9(b) prohibits the Galloway truck at issue in this case to operate on the roads of West Virginia with a gross vehicle weight in excess of 55,500 pounds; and,

(24) That the Galloway truck at issue weighed at the time of the accident in excess of 63,000 pounds; and,

(25) That while Mountain argues that the DOT Contract permits said vehicle to have a gross vehicle weight up to 63,000 pounds, such contract is subordinate to and cannot supersede the West Virginia statute; and,

(26) That pursuant to Rule 57 of the West Virginia Rules of Civil Procedure and the Uniform Declaratory Judgments Act, West Virginia Code § 55-13-1 et, seq., any person interested under a Contract may have determined any question of construction or validity arising under said Contract and obtain a declaration of rights, status or other legal relations thereunder, and therefore this Court has proper jurisdiction to determine Plaintiffs' Motion for Declaratory Judgement. Moreover, the Uniform Declaratory Judgments Act is designed to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered. (see West Virginia Code § 55-13-12); and,

(27) That in determining summary judgment, the Court is not to weigh the evidence to determine the truth of the matter, but merely to determine whether there is a genuine issue of material fact in dispute. Painter v Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994). Further, in evaluating a Motion for Summary Judgment, the Court shall construe the facts in a light most favorable to the non-moving party. Alpine Property Owners Assn. v. Mountaintop Dev. Co., 179 W.Va. 12, 365 S.E.2d 57 (1987). The Supreme Court has more recently, however, provided another facet for the Court to consider by the issuance of Fayette County National Bank v. Gary C. Lilly. et al, 199 W.Va. 499 (1997). In the Lilly case, the Court held as follows:

> 1. A motion for summary judgment should be granted only when (a) it is clear that there is no genuine issue of fact to be tried and (b) inquiry concerning the facts is not desirable to clarify the application of the law [inserted letters supplied]. Cited from Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y., 148 W.Va. 164 (1963);

(28) That one who would defend against tort liability by contending that the injuries were inflicted by an independent contractor has the burden of establishing that he neither controlled nor had the right to control the work, and if there is a conflict in the evidence and there is sufficient evidence to support a finding of the jury, the determination of whether an independent contractor relationship existed is a question for jury determination, Thomson v. McGinnis, 195 W.Va. 465, 465 S.E.2d, 922 at Syl. Pt. 6 (1995); and,

(29) That the doctrine of non-liability of one for the negligence of another because the latter is an independent contractor does not apply to relieve the former from liability for the omission of a duty imposed upon him by law on behalf of the safety of the public. Shaffer v. Acme Limestone Co., 524 S.E.2d 688 (W.Va 1999). Further, if

work is inherently dangerous in character or is likely to cause injury to another person if proper care should not be taken, such employer could not escape liability for the negligent performance of such work by delegating it to such independent contractor. Shaffer v. Acme Limestone Co., 524 S.E.2d 688 at 698 (W.Va. 1999); and,

(30) That, West Virginia Code, § 17C-17-9(b) is a public safety statute for which a private cause of action may be maintained for injury or harm resulting from its violation. Shaffer, at Syl. Pt. 8; and,

(31) That the independent contractor defense is unavailable to a party employing an independent contractor when the party causes unlawful conduct or activity by the independent contractor and such unlawful conduct or activity is a proximate cause of injury or harm. Shaffer at Syl. 6; and,

(32) That after reviewing all of the cited authorities by the respective parties, the Court has determined that it just and reasonable to conclude that the hauling of hot mix asphalt on the roads of West Virginia is an inherently dangerous activity; and,

(33) That one who carried on an activity which requires a franchise from a public authority and involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to others by the negligence of a contractor employed to perform the franchise activity. Griffith v. George Transfer, 157 W.Va. 316 ____ S.E.2d _____ (1973); and,

(34) That the DOT Contract and the Specifications incorporated therein impose upon Mountain the non-delegable duty to insure that the work under the Contract was performed in such a manner as to insure the safety of the public; and,

(35) That irrespective of whether Galloway was a "subcontractor", as referenced in DOH materials, or was an

"independent contractor" of Mountain, as argued by Mountain, Defendant Mountain yet retained the liability for any injuries or harm that resulted from the conduct of Galloway or Kirk; and,

(36) That while no privity of Contract existed between Mountain and the plaintiffs in this case, the ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the Defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result? Louk v. Isuzu Motors, Inc., 198 W.Va. 250, 479 S.E.2d 911 at Syl. Pt. 4 (1996); and,

(37) That the legal principle of "vicarious liability" is imposed under these circumstances to ensure that the public has legal access to a financially responsible party. Shaffer v. Acme Limestone Company, 524 S.E.2d 688 at 698 (1999); and,

(38) That the legal concept of punitive damages may be applicable or necessary when compensatory damages alone are not large enough to convince a defendant, or future defendants, to take precautions against similar problems. Games v. Fleming, 186 W.Va. 656, 660-1, 413 S.E.2d 897, 901-2 (1991). Punitive damages are appropriate when a defendant acts with wanton, willful or reckless conduct or criminal indifference to civil obligations affecting the rights of others to appear. Michael v. Sabado, 192 W.Va. 585, 453 S.E.2d 419 at Syl. Pt. 7 (1994); and,

(39) That punitive damages may serve several purposes. Among the primary purposes to be served are: (1) to punish the defendant; (2) to deter others from pursuing a similar course; and (3) to provide additional compensation for the egregious conduct to which the plaintiff has been subjected. Furthermore, punitive damages also provide a substitute for

personal revenge by the wronged party. Coleman v. Sopher, 201 W.Va. 588, 499 S.E.2d 592 at Fn. 22 (1997); and,

(40) That in response to Mountain's Motion for Summary Judgment, there is clearly sufficient evidence of a genuine issue of material fact in this case to allow a jury to determine whether Galloway was an independent contractor (although at trial this issue may be immaterial); whether Mountain negligently hired or retained Galloway to haul hot mix asphalt; whether there existed a joint venture by and between Galloway and Mountain; and whether punitive damages are warranted against Mountain; and,

(41) That in further response to Mountain's Motion for Summary Judgement, the Court has determined that the Court needs to hear the further exposition of evidence for the purpose of applying the conflicting legal theories of the parties to the evidence to be adduced, in light of the principles set out in Fayette County National Bank v Lilly, cited hereinabove; and,

(42) That in light of the entire record evidence as well as the arguments of counsel, the Court has determined that it is just and necessary to conclude that the hauling of asphalt "hot mix" on the roads of West Virginia, not in an empty truck but in an legally overweight truck with known bald tires, is an inherently dangerous activity, and therefore Mountain cannot insulate itself from liability for this accident by shielding itself in the independent contractor defense; and,

(43) That in light of the entire record evidence as well as the arguments of counsel, the Court has determined that it is further just and necessary to conclude and to **DECLARE** that pursuant to the Contract entered into by and between Mountain and the State of West Virginia, Mountain has a non-delegable duty to protect the safety of the public in connection with the performance of the work covered by the Contract; and,

(44) That in light of the entire record evidence as well as the arguments of counsel, the Court has determined that it is further just and necessary to conclude and to **DECLARE** that due to the terms of the DOT/DOH Contract, Mountain may not assert the independent contractor defense in this civil action, given the application of contract law; and,

(45) That in light of the entire record evidence as well as the arguments of counsel, the Court has determined that it is further just and necessary to conclude and to **DECLARE** that due to the terms of the DOT/DOH Contract, Mountain is vicariously liable for all acts and omissions committed by Galloway and Kirk in furtherance of the work contracted for between Mountain and DOT, given the application of contract law; and,

(46) That the Court notes the OBJECTIONS and EXCEPTIONS of all the parties to these rulings.

All of which is hereby ORDERED, ADJUDGED and DECREED.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Clerk of this Court shall provide notice of this Order by providing certified copies of this Order by USPS First Class Mail, by hand delivery, or by telefax communication to Michael J. Del Giudice at Ciccarello, Del Giudice & LaFon, 1219 Virginia Street, East, Charleston, West Virginia, to H. Truman Chafin, at P.O. Box 1739, Williamson, West Virginia 25661, to Robert P. Martin, at P.O. Box 2151, Charleston, West Virginia, 25328, to John Hoblitzel, at Kay, Casto & Chaney, P.O. Box 2031, Charleston, West Virginia, 25327, and to Mary Sanders, Huddleston, Bolen, Beatty, Porter & Copen, P.O. Box 3786, Charleston, WV 25330.

ENTERED: 10/26/00

/S/
JUDGE

APPENDIX B

[TRIAL COURT MEMORANDUM ORDER ON PUNITIVE DAMAGES]

[UNPUBLISHED]

IN THE CIRCUIT COURT
OF LINCOLN COUNTY
WEST VIRGINIA

DANIEL R. FITCH, Administrator of the Estates of Tyler Fitch and Harley Fitch, deceased, and DANIEL R. FITCH, individually,

PLAINTIFFS,

v. -- CIVIL ACTION NO. 99-C-86

MOUNTAIN ENTERPRISES, INC., d/b/a Lenore Asphalt, Inc., a Kentucky Corporation, JERRY GALLOWAY, individually and d/b/a Galloway's Trucking, and BILLY D. KIRK,

DEFENDANT.

MEMORANDUM ORDER ON PUNITIVE DAMAGES

On this the 5th day of June, this matter came before the court for a ruling, on Plaintiffs' motion for determination that a prima facie case for punitive damages has been established against all defendants. The Court has taken the opportunity to review the record in its entirety, paying careful attention to all the witnesses which have already testified prior to this ruling, Trooper Chapman, Public Service Commission Officer Koontz, Dr. Pesuit and Mr. Huey. The Court has also

carefully scrutinized the applicable law that has been submitted by the parties, as well as that which has been produced by its staff.

Discussion of Law

The law of this State regarding punitive or exemplary damages, has been the same since 1895, when the West Virginia Supreme Court held in syllabus point 4 of Mayer v Frobe, 40 W. Va. 246 (1995), that:

> In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may asses exemplary, punitive, or vindictive damages; these terms being synonymous.

Since 1895, the law of this State has continued to recognize this general rule regarding the application and interpretation of the principal of punitive damages. [For a broad review of this perspective, see TXO Production Corp. v. Alliance Resources Corp. 187 W. Va. 45, (1922)].

The test for determining whether a question of punitive damages can be submitted to the jury has recently expressed by the West Virginia Supreme Court as a question the Court must ask itself, being:

> Do the facts and inferences in this case point so strongly and overwhelmingly in favor of the [Defendant] to the extent that it did not act so maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that no reasonable jury could have reached a verdict against the [Defendant] on the issue of punitive damages?

Alkire v. First Nat. Bank of Parsons, 475 S.E.2d 122 (1966). If the Court answers this question in the negative, then the submission of a question of punitive damages to the jury is proper. In this case, the Court is of the opinion that the principal of punitive damages applicable from the Mayer Case in 1895 to date is the principal that makes the Alkire analysis operative and appropriate for application to the facts and circumstances related to the Defendants, Kirk and Galloway Trucking.

However, when the conduct for which punitive damages is sought is not direct conduct by the tortfeasor, but rather conduct by an employer or supervisor, then the issue in the Court's opinion becomes slightly more complicated. The West Virginia Supreme Court has historically allowed for punitive damages to be levied against a master for the torts of its servants, agents or employees, if the offending conduct was expressly or impliedly authorized or ratified by the master. Ricketts v. Chesapeake & Ohio Railway Co., 33 W. Va. 433 (1890). It is important to note, however, that any award of punitive damages against such a master , is not by way of vicarious liability, but rather is levied directly against the master as a result of the acts or omissions of the master, in light of the acts or omissions of the servant. See Jarvis v. Modern Woodmen of America, 185 W. Va. 305 (1991); and Addair v. Huffman, 156 W. Va. 592 (1973). Synoptically, punitive damages are levied to both punish conduct that has occurred, and to deter such conduct in the future. Within that context, it would equitably serve neither of these purposes for a master to simply be vicariously liable for its servants. Rather, if the goal is to punish the servant, then the punitive damages award should be against the servant, and the master should not be liable for such punitive damages.

When the master has expressly or impliedly authorized or ratified the offensive conduct by the servant, agent or employee, however, the master may have an award of punitive damages levied directly against them, for the

master's acts or omissions of implicitly or explicitly authorizing or ratifying such conduct. For a proper understanding of this issue then, it must be emphasized that such an award of punitive damages would be owed directly by the master, and it has nothing to do with any form of vicariously liability, such as would be the case for compensatory damages. It is from this perspective that the Court is of the opinion that a more positively articulated standard of proof should apply to the Court's review and consideration of the burden to be met regarding punitives, which would allow, or disallow, an award of punitive damages by the jury against Defendant Mountain Enterprises, Inc. Particularly, the Court has determined and articulated on the record the standard as follows: Is there sufficient evidence to support a verdict making an award of punitive damages against the Defendant, Mountain Enterprises, Inc., for any acts or omissions on its part which either implicitly or expressly ratified or authorized the acts or omissions of Defendant's Kirk or Galloway Trucking Company.

Having carefully reviewed the evidence adduced and the law applicable in this case, the Court is of the opinion that it would be proper to submit to a jury a question of punitive damages for the acts or omissions of Defendants Billy Kirk and Jerry Galloway. Having reviewed the legal precepts cited above, as well as other applicable law, the Court has determined that as a matter of fact and law, Defendant Kirk, due to his conviction for "negligent homicide", and the evidence adduced in this case, Plaintiffs have met the prima facie burden of proof and may adduce evidence on the issue of punitive damages. Further, the Court has determined as a matter of fact and law, that Plaintiffs have met their prima facie burden regarding punitive damages concerning Defendant Galloway Trucking Company, based upon the evidence adduced in this case, and expressly not taking into consideration the "nolo contendre" plea to Galloway's "accessory to negligent homicide." [See West Virginia

University Board of Trustees v. Fox, 197 W. Va. 91 (1996).] In that regard, the Plaintiffs may adduce evidence regarding punitive damages concerning Galloway Trucking. Wherefore, the Court, having reviewed the facts so far presented to the jury, expressly finds that there is not enough evidence in favor of Defendants Kirk and Galloway Trucking that a jury could not find that they acted willfully wantonly, recklessly, or with criminal indifference to civil obligation affecting the rights of others. Therefore, the Court hereby finds that a prima facie case for an award of punitive damages has been established by Plaintiffs, regarding Defendants Kirk and Galloway Trucking.

Having further carefully reviewed the evidence adduced and the law applicable in the case, the Court is of the opinion that the evidence presented, as well as the reasonable inferences that could be drawn from that evidence, can support a jury finding that Defendant, Mountain Enterprises, either expressly or impliedly authorized or ratified the conduct of Defendants Kirk and Galloway Trucking. As a result, the Court believes that it would be proper to submit to the jury a question of punitive damages regarding Defendant, Mountain Enterprises. Wherefore, the Court does hereby find that a prima facie case for punitive damages had been established regarding Defendant, Mountain Enterprises. The Court also acknowledges the possibility that facts could establish, at a latter time in the trial process, a prima facie case against Defendant Mountain Enterprises, for any acts or omissions for which Defendant Mountain Enterprises may have been directly responsible.

The Court notes the objections of all parties to those rulings adverse to their interests.

All of which is hereby ADJUDGED, ORDERED AND DECREED. It is further ADJUDGED ORDERED and DECREED that the clerk of this Court shall provide notice of this decision, by providing certified copies thereof, to the

respective counsel hereinafter set forth, by the United States Postal Service, First Class Mail, by hand delivery, or by telefax communication.

Entered this //7th// day of June, 2001 //AD//

/s/

JUDGE

APPENDIX C

[TRIAL COURT'S RULING FROM BENCH EXCLUDING TESTIMONY OF WEST VIRGINIA DEPARTMENT OF HIGHWAYS OFFICIAL ROBERT TINNEY]

[UNPUBLISHED]

June 15, 2001 Transcript at 14:

> THE COURT: Well, again, that is a classic example of the parole evidence rule. If there is some problem with the contract – I have reviewed the contract and ruled upon the contract.
>
> I do, however, believe it is proper if Mountain gets up and says what their state of mind is, number one.
>
> Number two, if Mr. Tinney has had some conversation with Mountain employees whereby Mountain has restated to them; i.e., you get past the hearsay rule, as to what their state of mind was in that regard, that is relevant.
>
> What isn't relevant is what Mr. Tinney's state of mind is. He is not a party. I have already ruled on this contract. What he believed the contract said and what the contract said are two different things, and I have already ruled that it is what the contract says.

APPENDIX D

[EXCERPTS FROM TRIAL COURT'S JUNE 27, 2001 JURY INSTRUCTIONS]

[UNPUBLISHED]

**IN THE CIRCUIT COURT
OF LINCOLN COUNTY,
WEST VIRGINIA**

DANIEL R. FITCH,
Administrator of
the Estates of Tyler Fitch and
Harley Fitch, deceased, and
DANIEL R. FITCH,
individually,

Plaintiffs,

CIVIL ACTION NO. 99-C-86

v.

MOUNTAIN ENTERPRISES,
INC., d/b/a Lenore Asphalt,
Inc., a Kentucky Corporation,
JERRY GALLOWAY,
individually and d/b/a
Galloway's Trucking, and
BILLY D. KIRK,

Defendants.

**THE COURT'S CHARGE AND INSTRUCTIONS,
CIVIL CASES**

* * *

[D]uring your deliberations toward a verdict in this case, you may consider the following:

* * *

> (3) That as a matter of law, because of the legal relationship between the Defendant, Jerry Galloway, dba Galloway's Trucking, and Defendant, Mountain Enterprises, Inc., and because of the non-delegable contractual duties and obligations owed by the Defendant, Mountain Enterprises, Inc. to the State, Mountain Enterprises, Inc. is legally at fault and liable for these events, and the compensatory damages which have resulted.

* * *

PUNITIVE DAMAGES

The Court instructs the jury that in addition to compensatory damages, in a proper case the jury may award additional damages known as punitive damages against defendants as punishment for willfulness, wantonness, malice or other like aggravation of the wrong done to the plaintiff.

Punitive damages are something in addition to full compensation not given as the plaintiffs due, but given rather with a view to the enormity of the offense to punish the defendants and, thus, make an example of them so that others may be deterred from committing similar offenses. The law awards compensatory damages when the unlawful act is done without intent to do wrong or where there is no malice or where the offense is not oppressively or recklessly committed, while punitive damages are awarded where the wrongful act is done with a bad motive, or in a manner so wanton or reckless as to manifest a willful disregard of the rights of others. Wells v. Smith, 171 W. Va. 97, 297 SE 2nd

897 (1992), Games v. Fleming Land Fill. Inc., 186 W. Va. 656, 413 SE 2d 897 (1992).

First, if you find from the evidence in this case that any of the defendants were guilty of wanton, willful or reckless conduct, or criminal indifference to the civil obligations affecting the rights of others, or extremely negligent conduct that is likely to cause serious harm, you may award the plaintiffs punitive damages in such sum as you believe sufficient to punish the defendants and to discourage such future conduct.

* * *

APPENDIX E
[TRIAL COURT ORDER ON REVIEW OF PUNITIVE DAMAGES]
[UNPUBLISHED]

IN THE CIRCUIT COURT OF LINCOLN COUNTY,
WEST VIRGINIA

DANIEL R. FITCH and GREGORY ADAM PLUMLEY, Co-Administrators of the Estates of Harley Fitch and Tyler Fitch, deceased, and DANIEL R. FITCH, Individually,

Plaintiffs,

v. CIVIL ACTION NO. 99-C-86

MOUNTAIN ENTERPRISES, INC., d/b/a LENORE ASPHALT, INC., a Kentucky Corporation, JERRY GALLOWAY, individually, and d/b/a GALLOWAY'S TRUCKING, and BILLY D. KIRK,

Defendants.

OPINION ORDER ON REVIEW OF PUNITIVE DAMAGES

I. Introduction

This matter came before the Court on the 29th day of August, 2001, for hearing on Defendants' Motion for Review of Punitive Damage Award, following the jury's verdict in this case. This Court has considered and is resolving the issues raised in accordance with the requirements set forth in

Garnes v. Fleming Landfill, Inc., 186 W. Va. 656 (1991), and subsequent decisions.

Present at the hearing were plaintiff Daniel R. Fitch, by counsel H. Truman Chafin; plaintiff Gregory Adam Plumley, by counsel Michael C. Allen; defendant Mountain Enterprises, Inc., by counsel A. L. Emch, Gretchen M. Callas Mary H. Sanders and James R. Akers; defendant Jerry Galloway, by counsel Robert P. Martin; and defendant Billy D. Kirk, by counsel John R. Hoblitzell.

This matter was tried to a jury over the course of six weeks. On the 28th day of June, 2001, a verdict was entered in favor of the plaintiffs. They returned a verdict awarding both compensatory and punitive damages. The jury awarded a total of $5,918,558.57 in compensatory damages; $2,959,214.16 in compensatory damages to the Estate of Harley Fitch and $2,959,344.41 in compensatory damages to the Estate of Tyler Fitch. The jury awarded a total of $12,110,000.00 in punitive damages; $10,000.00 was levied against Billy D. Kirk for his independent actions or failing to act; $50,000.00 was levied against Jerry Galloway d.b.a. Galloway Trucking, for his independent actions or failure to act; $50,000.00 was levied against Jerry Galloway d.b.a. Galloway Trucking for implicitly or explicitly authorizing or ratifying the actions of Billy D. Kirk; $6,000,000.00 was levied against Mountain Enterprises Inc. for its independent actions or failure to act; and $6,000,000 was levied against Mountain Enterprises Inc. for implicitly or explicitly authorizing or ratifying the actions of Billy D. Kirk and Jerry Galloway d.b.a. Galloway Trucking.

II. Applicable Law

A. *Punitive Damages Generally*

As this Court noted in its order of June 7th, 2001 ("June 7th Order"), the law of this State setting out the standard for

the award of punitive or exemplary damages has been the same since 1895, when the West Virginia Supreme Court held:

> In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.

Mayer v. Frobe, 40 W. Va. 246, Syl. Pt. 4 (1895); see Alkire v. First Nat'l Bank of Parsons, 197 W. Va. 122, 129 (1996) ("[W]e are still committed to the traditional rule announced in Mayer and cited with approval in a number of subsequent cases.")

As June 7th Order also pointed out, the test for determining whether a question of punitive damages can be submitted to the jury has been recently expressed by the West Virginia Supreme Court as a question the Court must ask itself, being:

> Do the facts and inferences in this case point so strongly and overwhelmingly in favor of the [Defendant] to the extent that it did not act so maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that no reasonable jury could have reached a verdict against the [Defendant] on the issue of punitive damages?

Alkire v. First Nat. Bank of Parsons, 197 W. Va. 122 (1996). If the Court answers this question in the negative, then the submission of a question of punitive damages to the jury is proper.

The June 7th Order also points out that West Virginia precedent permits punitive damages to be levied against a

master for the torts of its servants, agents, or employees, if the offending conduct was expressly or impliedly authorized or ratified by the master. Ricketts v. Chesapeake & Ohio Railway Co., 33 W. Va. 433 (1890). Such an award is not by way of vicarious liability, as would be the case for compensatory damages, but rather is levied directly against the master as a result of the acts or omissions of the master, in light of the acts or omissions of the servant. See Jarvis v. Modern Woodmen of America, 185 W. Va. 305 (1991); and Addair v. Huffman, 156 W. Va. 592 (1973).

At trial, this Court determined that facts had been sufficiently established to allow the jury to consider the issue of punitive damages against: Billy Kirk for his own acts or omissions; Jerry Galloway for his own acts or omissions, and for authorizing or ratifying the actions or omissions of Billy Kirk; and Mountain Enterprises Inc. for its own acts or omissions, and for authorizing or ratifying the acts of Jerry Galloway and/or Billy Kirk.

B. *Review of Punitive Damages*

In Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, (1991), the West Virginia Supreme Court of Appeals identified nine factors that are a minimum to be considered in determining whether a punitive damages verdict is excessive. A minimum five factors were listed as factors to be carefully explained to, and considered by, a jury in awarding punitive damages:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

Syllabus Point 3, Garnes 186 W. Va. at 658-659.

The Court went on to list an additional four factors which in conjunction to the five given by the jury were to be considered by the Circuit Court in reviewing any award of punitive damages returned by a jury:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Syllabus Point 4, Garnes 186 W. Va. at 659.

In 1996, the United States Supreme Court, in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), identified three "guideposts" for reviewing the constitutionality of a punitive damage award: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive award to the harm inflicted on the plaintiff(s); and (3) the comparison of the punitive award to the civil or criminal penalty that could be imposed for comparable misconduct. In 1997, the West Virginia Supreme Court held in Vandevender v. Sheetz, Inc., 200 W. Va. 591 (1997), that the factors set out in Garnes were sufficient to satisfy the constitutionality test of the guideposts established by BMW.

III. Discussion of Facts and Law

A. *Submission to Jury of Punitive Damages*

In the Order of June 7, 2001, the Court made specific findings that Plaintiffs had established their prima facie case in order to submit punitive damages to the jury in several respects. The Court specifically found that facts and evidence already presented to the jury at that point were sufficient for the jury to consider punitive damages against Defendants Billy D. Kirk and Jerry Galloway, for their independent acts or omissions. That facts also had established at that point a prima facie case for the jury to consider punitive damages against Mountain Enterprises, Inc., for expressly or impliedly authorizing or ratifying the

actions of Billy Kirk or Jerry Galloway. The Court also recognized that evidence may well justify the submission of punitive damages to the jury on other theories.

This ruling of the Court served simply to establish that a prima facie case for punitive damages had been established against all Defendants, for the purpose of admitting evidence. Subsequent to that ruling, the Court made specific findings on the record that facts and evidence adduced before the jury were sufficient to establish a prima facie case for punitive damages against Jerry Galloway for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk. The Court also made specific findings that facts and evidence presented to the jury were sufficient that the jury could find that independent acts or omissions by Mountain Enterprises were grounds for punitive damages.

Over the course of the trial, the court received proposed jury instructions and verdict forms from all parties. After carefully considering all proposed instructions and forms, the Court drafted its own set of instructions and verdict form. The Court's instructions and verdict form allowed the jury to consider and return an award of punitive damages against: Billy D. Kirk for his independent actions or omissions; Jerry Galloway d.b.a. Galloway Trucking, for his independent actions or omissions; Jerry Galloway d.b.a. Galloway Trucking for implicitly or explicitly authorizing or ratifying the actions of Billy D. Kirk; Mountain Enterprises Inc. for its independent actions or omissions; Mountain Enterprises Inc. for implicitly or explicitly authorizing or ratifying the actions of Billy D. Kirk and Jerry Galloway d.b.a. Galloway Trucking. Parties were given the time during which the jury deliberated to raise any objections they may have had to the Court's instructions or verdict form, a total of six and one-half hours, and the only objection made was Mountain Enterprises, Inc.'s objection to the two lines for punitive damages.

B. *Ambiguity in the Jury's Verdict*

Defendant, Mountain Enterprises, Inc., has raised the issue of there being some ambiguity in the jury's verdict. However, this Court is disinclined to accept that the jury was at all ambiguous. They were given no opportunity for ambiguity in any way. On the verdict form, the jury was given five opportunities to award punitive damages; once for Billy Kirk, and twice each, on different grounds, for Jerry Galloway and Mountain Enterprises, Inc. Each of these five opportunities was phrased as a yes or no question, with a blank for yes, and a blank for no. The jury marked "yes" in each case, for each ground, and provided an amount. Looking at these facts as they have been stated here, the Court can find no ambiguity in the jury's verdict.

The contention seems to rest however, in that for both Defendants Jerry Galloway and Mountain Enterprises, Inc., the jury awarded the same amount for each ground: for Jerry Galloway, fifty thousand dollars ($50,000) for his independent acts or omissions and fifty thousand dollars ($50,000) for his expressly or impliedly authorizing the acts or omissions of Billy Kirk; for Mountain Enterprises Inc., six million dollars ($6,000,000) for its own independent acts or omissions, and six million dollars ($6,000,000) for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk and Jerry Galloway. The argument then, is that it is possible that the jury could have intended that the two separate awards for each Galloway and Mountain were not to be cumulative, but rather, that each amount represented the full amount to be levied against each Defendant, respectively.

The Court is disinclined to agree with this argument. There is no ambiguity in the jury's verdict. They were posed yes or no questions, to which they dutifully returned answers. There is no question or ambiguity as to what those answers were, or the amounts awarded. The real question is whether or not the Court's instructions and verdict form were such

that the jury would not have understood what they were asked to do.

In this case, the Court does not believe that its instructions or verdict form were such that the jury would not be able to understand what was asked of them. The Court was very careful in explaining the applicable legal provisions and what the jury was entitled to consider. The Court explained each separate ground for punitive damages that could be levied against each defendant and the burden of proof for each. In further support of the Court's instructions, prior to the verdict being rendered, neither Plaintiffs nor Defendants appeared to have any objections to them, as all were given ample time to make any objections they may have had and none were made.

While the Court does recognize the possibility that in spite of all the care and caution taken by both the Court and counsel, the jury may still have misunderstood what it was asked to do, this Court will not alter a jury's verdict on the mere possibility that it may have misunderstood the Court. This is particularly true when there is no evidence that would indicate any kind of misunderstanding in fact. As has already been stated, the Court was very careful in explaining the law. The verdict form was as simple as could be accomplished in such a case as this, and on the basis of the questions posed by the jury during deliberations, they appeared to be cognizant and fully able to grasp the issues and peculiarities of the case. Furthermore, counsel for Plaintiffs and Defendants argued the facts and the law to the jury in closing arguments, again explaining the law and grounds for punitive damages, as well as why or why not an award should be returned on each ground.

The Court cannot find any reason to believe that its instructions or verdict form were ambiguous, misleading, or in any way unable to be understood. Although Mountain Enterprises, Inc. did object to two lines being used on the

verdict form for the two separate grounds of punitive liability, no objections by any counsel were made to the instructions explaining the form. Thus there is no reason to believe that the jury would not understand what they were asked to do in filling out the verdict form. Finally, the Court also cannot find any reason to believe that the jury did in fact misunderstand the instructions of the court or the verdict form. Therefore, the Court can find nothing ambiguous in the jury's verdict.

C. *Possibility of a Double Recovery*

Defendant, Mountain Enterprises, Inc., has also raised the possibility that allowing the jury to return an award of punitive damages on the two alternate bases may constitute a double recovery, and as such, would be prohibited. In support of this Defendants have cited Harless v. First Nat'l Bank, 169 W. Va. 673 (1982); and Tudor v. Charleston Area Med. Ctr., Inc., 203 W. Va. 111 (1997). However, this case is different from the two cited, in that in Harless, there were alternate theories of recovery on which separate awards were granted, and in Tudor, there was simply concern over damages for intentional infliction of emotional distress being duplicative of punitive damages. In this case, the two grounds for punitive damages are not alternate theories, but entirely separate grounds for recovery. While there is some concern that the jury could confuse the two grounds and return two verdicts for the same conduct, that kind of error should be able to be cured with instructions to the jury, which the court endeavored to do, without objection from counsel.

The Court does believe, however, that in a case such as this, particularly in reviewing the awards of punitive damages, the Court needs to take great care that the two awards are not duplicative, or for the same conduct. In reviewing the evidence presented the jury at trial, the Court is of the opinion that there is no double recovery, or two awards

for the same acts or omissions. The jury had ample facts before it on which it could have based either or both punitive damage awards.

Simple examples, without recapping all of the evidence before the jury, would for Jerry Galloway be: The jury could have based its direct punitive damage award on evidence that Jerry Galloway may have allowed trucks on the road that were known to have safety violations, or that he failed to test his drivers as he was required to do; the jury could have based its punitive damage award for authorizing or ratifying the acts or omissions of Mr. Kirk, on evidence that Jerry Galloway knew of the specific problems that led to the bald tires, and may even have known of the bald tires themselves, and still allowed, and/or told Mr. Kirk to drive.

For Mountain Enterprises, Inc.: The jury could have based its direct punitive damage award on evidence that Mountain made no effort at all to secure the public's safety in regard to its haulers, as required under its contract with the West Virginia Department of Transportation. Or it may have relied upon evidence that Mountain Enterprises Inc., overloaded the trucks on a regular basis; for the punitive damage award for authorizing or ratifying the actions of Billy Kirk and/or Jerry Galloway, the jury may have relied upon evidence that Mountain Enterprises, Inc. employees knew or should have known of the bald tires, and loaded the truck anyway. Or the jury may have relied upon evidence, as counsel for Mountain Enterprises, Inc. suggests, that Mountain Enterprises, Inc. did not inspect any of the safety conditions of the trucks of its haulers, even though it made a separate profit on the hauling of the asphalt.

The evidence suggested by the Court is by no means the extent of what the jury had to rely upon. It is merely suggestive of evidence that they *could* have relied on. The Court does not believe that it was necessary for the jury to look to the same act or omission in rendering punitive

damage awards on different grounds against either Jerry Galloway, or Mountain Enterprises, Inc. That being the case, the Court does not believe that there is any double recovery.

D. *Application of the Garnes Factors.*

As set forth above, this Court is required to review punitive damage awards in accordance with nine factors set out in Garnes v. Fleming Landfill, Inc., 186 W. Va. 656 (1991). The Court will address each factor in seriatim, and as applied to each punitive damage award rendered.

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

a. Billy D. Kirk

The accident involved the deaths of a mother and two minor children, with the minor children being the subject of this lawsuit. The cause of the accident was undisputed in that a dangerously bald tire blew out on a fully loaded, sixty-three thousand forty pound (63,040 lb.) truck carrying hot-mix asphalt, causing the truck to collide with and crush the victims' car. In this case, the result was the death of three people. In the opinion of this Court, it is hard to imagine a more grievous harm. While it is true that there is no guarantee that the same result would occur, or even if another car would be involved, if the same accident occurred again, it is nevertheless a very real possibility. Billy D. Kirk had a punitive damage award of ten thousand dollars ($10,000)

assessed against him. This factor weighs in favor of upholding the verdict.

b. Jerry Galloway for his own independent acts or omissions.

As was stated above, the result of this accident was the death of three people. In the opinion of this Court, it is hard to imagine a more grievous harm. Should a similar truck with similar tires be driven again, there is little doubt that a similar accident would occur. Likewise, should there be other vehicles involved when it does occur, death of the occupants would again be a likely result. Jerry Galloway had a punitive damage award of fifty thousand dollars ($50,000) assessed against him for his own acts or omissions. This factor weighs in favor of upholding the verdict.

c. Jerry Galloway for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk.

As was stated above, the result of this accident was the death of three people. In the opinion of this Court, it is hard to imagine a more grievous harm. Should a similar truck with similar tires be driven again, there is little doubt that a similar accident would occur. Likewise, should there be other vehicles involved when it does occur, death of the occupants would again be a likely result. Jerry Galloway had a punitive damage award of fifty thousand dollars ($50,000) assessed against him for authorizing or ratifying the actions of Billy Kirk. This factor weighs in favor of upholding the verdict.

d. Mountain Enterprises, Inc. for its own independent acts or omissions.

As was stated above, the result of this accident was the death of three people. In the opinion of this Court, it is hard to imagine a more grievous harm. Should a similar truck with similar tires be driven again, there is little doubt that a similar accident would occur. Likewise, should there be other vehicles involved when it does occur, death of the occupants would again be a likely result. Mountain Enterprises, Inc. had a punitive damage award of six million dollars ($6,000,000) assessed against it for its own acts or omissions. This factor weighs in favor of upholding the verdict.

e. Mountain Enterprises, Inc. for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk and/or Jerry Galloway.

As was stated above, the result of this accident was the death of three people. In the opinion of this Court, it is hard to imagine a more grievous harm. Should a similar truck with similar tires be driven again, there is little doubt that a similar accident would occur. Likewise, should there be other vehicles involved when it does occur, death of the occupants would again be a likely result. Mountain Enterprises, Inc. had a punitive damage award of six million dollars ($6,000,000) assessed against it for authorizing or ratifying the actions of Billy Kirk and/or Jerry Galloway. This factor weighs in favor of upholding the verdict.

(2) The reprehensibility of the defendant's conduct. The jury should take into account how long the defendant

> continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

a. Billy D. Kirk.

The evidence in this case suggests that even if no one else knew of the condition of the tires, which were the ultimate cause of the accident, Billy Kirk knew. Further, with tires as dangerously bald as they were, there was little doubt that one would blow out eventually, it was simply a guessing game as to whether it would be possible to get one more run out of them. Again, there was no guarantee that even if they blew out, there would be anyone else around to be injured, but the truck traveled on a public roadway, and the possibility was always present.

There was no evidence to suggest that the tires were habitually as bald as they were on the day of the accident. However, there was some evidence to suggest that at least the day previous to the accident, Mr. Kirk knew that the tires were wearing thin. Mr. Kirk also knew of a mechanical defect in the truck, which may have caused the tires to wear more rapidly than would normally be the case.

To Mr. Kirk's credit, he immediately took full responsibility for his actions, including entering a criminal plea in the criminal side of this case. As far as this Court is aware, Mr. Kirk cooperated in every way, in an attempt to make amends for his part in this accident. While the act of

driving the truck with such dangerous tires, was certainly reprehensible, the efforts Mr. Kirk made to make amends are substantial, and certainly weigh in favor of Mr. Kirk. However, considering all of the actions taken by Mr. Kirk, as well as the consequences for those actions, the Court still cannot say that the ten thousand dollar ($10,000) punitive damage award granted by the jury was excessive. Therefore, this factor weighs in favor of upholding the verdict.

b. Jerry Galloway for his own independent acts or omissions.

The evidence in this case suggests that Mr. Galloway while attempting to keep his trucks in good working order, often allowed them on the road with known mechanical defects, which were in violation of the law in regards to the applicable safety regulations. Further, there was evidence introduced that suggested that Mr. Galloway did not test his drivers to ensure that they were not under the influence of any kind of impairing drug or alcohol, even though under contract he was required to make such tests. These actions alone are reprehensible enough, in the Court's view, to justify the award of punitive damages. It is unknown how long or how often there were trucks on the road in disrepair, but the evidence suggested that Mr. Kirk's truck was not the only truck not in conformance with the law, nor were the tires the only violation on Mr. Kirk's truck.

On the evidence the Court has at hand, it is impossible to gauge the likelihood of such an accident happening again, but the Court does take very seriously the fact that these violations existed at all. These trucks hauling asphalt, were extremely large, heavy trucks weighing, when loaded, in excess of sixty three thousand pounds (63,000 lbs.). It is not hard for the Court to foresee, and should not have been difficult for Mr. Galloway to foresee, that any accident involving one of these extremely heavy trucks could easily

result in very serious injuries and even death as was the case here.

In Mr. Galloway's favor, he did attempt to make a prompt settlement, paying into the Court the policy limits of his insurance. Mr. Galloway also pled *nolo contendere* to criminal charges as a result of this accident. Even taking these actions subsequent to the accident into account, when considering all of Mr. Galloway's actions, the Court cannot conclude that the fifty thousand dollar ($50,000) award of punitive damages against Mr. Galloway was excessive. Therefore, this factor weighs in favor of upholding the verdict.

c. Jerry Galloway for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk.

Evidence presented to the Court suggests that Mr. Galloway may have had actual knowledge of the condition of the tires and/or the underlying mechanical defect which could have led to the tires wearing abnormally fast, and told Mr. Kirk to drive anyway. Evidence also suggested that Mr. Galloway may have encouraged his drivers to continue driving trucks with safety violations, if the violations were discovered in the middle of the day, preferring to service the trucks after hours when they were not needed on the construction sites.

If the jury believed that Mr. Galloway actually knew of the condition of the tires, or that there was a defect to the truck such that the tires were likely to wear out and possibly blow, then in this Court's opinion the punitive award of fifty thousand dollars ($50,000) was completely justified. Further, even making an offer of settlement, promptly as Mr. Galloway did, and his complete cooperation, would not be

enough to offset such an action. Certainly, had the accident not occurred when it did, and if Mr. Galloway had continued to instruct his drivers to drive in spite of known safety violations, it would only have been a matter of time before there was another accident. Under this factor, the Court believes that the fifty thousand dollar ($50,000) punitive award for authorizing and/or ratifying the actions of Billy Kirk was not excessive, and therefore, this factor weighs in favor of upholding the verdict.

d. Mountain Enterprises, Inc. for its own independent acts or omissions.

Evidence presented the jury at trial, could allow the jury to infer that Mountain made no effort at all to secure the public's safety in regard to its haulers, as required under its contract with the West Virginia Department of Transportation. Evidence also showed that Mountain Enterprises, Inc., loaded the trucks of its haulers, in excess of the statutory limit, on a regular basis. The jury could easily infer such overloading caused additional wear on both the tires of the vehicles, and the vehicles themselves.

The overloading of the trucks in and of itself is only mildly reprehensible. There is real confusion concerning the applicable weight standards in effect, and the amount to which the truck was actually overweight. However, the failure of Mountain Enterprises, Inc. to do anything at all to insure the safety of the public in regard to its contracted haulers, in spite of Mountain Enterprises Inc.'s agreement with the State of West Virginia that they would in fact ensure the safety of the public under all aspects of the project, strikes the Court as the kind of thing that cannot be permitted.

Mountain Enterprises Inc., claims that it had no responsibility for its independent haulers, and that its

agreement with the State did not extend to those "independent contractors." If this were true, then Mountain Enterprises Inc.'s acts and/or omissions would certainly be less reprehensible. However, as has been set out elsewhere, that is simply not the case. Evidence clearly shows that Mountain Enterprises, Inc., often had a direct hand in hiring drivers when new drivers were needed. It was also brought out at trial that Mountain Enterprises made a separate profit on its haulers; meaning that the hauling of the asphalt was not an expense to Mountain Enterprises Inc., in the overall scheme of business, but rather a service for which they charged, marked up and made a separately calculated profit. This Court believes that a company earning a profit on an aspect of a business, also earns a share of the responsibility for that aspect of the business. Mountain Enterprises, Inc., refused to accept any responsibility at all in monitoring the trucks, the drivers, whether the required safety checks on either have been made by someone else, or even a share in the responsibility after overloading a truck that was subsequently involved in an accident. The Court finds that to be reprehensible.

Further, this Court is aware of no evidence to show that at any other time while Mountain Enterprises, Inc. was doing business, that it operated in any other way. Nor is the Court aware of any evidence that Mountain Enterprises, Inc., had changed its business practices at any time prior to trial, even after this Court determined as a matter of law that it was responsible. Nor is this Court aware of any evidence that Mountain Enterprises, Inc., has yet changed its practices as a result of the accident that was the subject of this case. Since that accident, Mountain Enterprises, Inc. has not, to this Court's knowledge, begun to inspect trucks that haul its asphalt, or even require that the trucks be inspected regularly. All of this the Court also finds to be reprehensible.

Finally, this Court is not of the opinion that at any time, Mountain Enterprises attempted to make a fair and prompt

settlement of this case. The issue of liability was taken away from the parties on October 26th, 2000 when this Court held as a matter of law that Mountain Enterprises, Inc. was liable for compensatory damages for the accident in this case. However, even after this operation of law, Mountain Enterprises, Inc., did not seem to accept any responsibility. At trial Counsel for Mountain Enterprises, Inc., made it clear to the Court and the jury that Mountain Enterprises, Inc., did not agree with the Court's ruling on liability, and seemed to do all but argue to the jury that the Court was incorrect. The Court accepts that this kind of evidence and argument, while perhaps pushing the envelope, was nevertheless proper as evidence of notice to Mountain Enterprises, Inc. as to its legal duty for purposes of punitive damages. However it also stands as an example of the posture Mountain Enterprises, Inc. took in this case, and presumably in its settlement negotiations.

To this Court's knowledge, the offer that was made to Plaintiffs in order to settle this case, was tendered to the Court as an offer of Judgment in November of 2000, which offer was three million, two hundred thousand dollars ($3,200,000). To the Court's knowledge, no larger offer was made at any time. When that trial was continued, there was a second offer of judgment made close to what ended up being the actual trial date, of three million dollars ($3,000,000). While this is certainly a substantial amount of money, it is four hundred thousand dollars ($400,000) less than double the settlement offered and accepted in the companion case to this one, for the death of Leigh Ann Poindexter, the mother of the victims in this case. It should also be noted by the Court that Offers of Judgment were made to Counsel representing the estate of Leigh Ann Poindexter, and the second offer went up instead of down. This Court has no knowledge of the dynamics of the settlement negotiations, but it is hard to escape the fact that the case in which the offers went up settled, and this case did not.

There was substantial evidence presented to the jury in establishing the expected earning potential of the children. This evidence focused in part on the probabilities of each child attending college, how far each child would go in college, and what type of degree might be obtained. Higher income potential was given for each additional level of education, and then the total was averaged in accordance with the probability for each. Mrs. Poindexter did not, to this Court's knowledge attend college, or have any kind of college degree. Mrs. Poindexter was also substantially older than her children, with many of her normal earning years already behind her. Certainly, under this kind of analysis, each of the children would have had a greater earning capacity than their mother. Furthermore, this Court refuses to believe that damages for loss of consortium and like damages would be lower for either children than for their mother.

Following this reasoning, it would seem that an offer of settlement by Mountain Enterprises, Inc., of at least three million four hundred thousand dollars ($3,400,000) would not be an unreasonable offer of settlement to make. Furthermore, given that the total verdict for compensatory damages returned in this case was nearly six million dollars ($6,000,000), an offer of three million dollars ($3,000,000) seems exceptionally low. This is especially true in light of the fact that Mountain Enterprises Inc., carried an insurance policy of approximately thirty million dollars ($30,000,000), more than enough to pay the verdict returned in this case, and certainly enough to cover a more generous offer of settlement. This Court is certainly not going to, at this time, examine or address whether a three million dollar ($3,000,000) offer was unreasonably low, but it does seem clear to the Court that the offer was not such an effort toward prompt and fair settlement as to justify a reduction in the jury's award of punitive damages.

Therefore under this factor, the jury's award of six million dollars ($6,000,000) in punitive damages does not seem excessive, and weighs in favor of upholding the verdict.

e. Mountain Enterprises, Inc. for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk and/or Jerry Galloway.

Evidence presented the jury at trial, suggests that employees of Mountain Enterprises, Inc. may have had actual knowledge of the condition of the tires on the day of the accident, and loaded the truck anyway. Certainly Mountain Enterprises, Inc. employees saw the truck Mr. Kirk drove, as well as the rest of the trucks owned by Mr. Galloway, on nearly a daily basis and had opportunity to see it not just on the day of the accident, but throughout the performance of the contract. It would have been extremely difficult for employees of Mountain Enterprises, Inc, who regularly saw these type of trucks, not to notice when there were obvious mechanical defects and/or safety violations. Yet there was no evidence of Mountain Enterprises, Inc. ever refusing to load one of the trucks presented to pick up hot-mix asphalt.

This is especially true in regard to the dangerously bald tires that were the cause of this accident. As the evidence showed that Mr. Kirk borrowed a phone from a Mountain Enterprises, Inc. employee to call Mr. Galloway about the tires. Whether or not the employee heard the actual conversation is arguable, but it is conceivable the jury could conclude that they did, or were at least aware of the subject matter. Certainly the tires are an external defect readily visible, and as bald as they were, most likely hard to miss. In addition, while evidence was not presented as to specific instances, evidence was presented sufficient for the jury to conclude that there had been other defects and/or safety

violations in trucks on other occasions that would have been noticeable to Mountain Employees, even without a formal inspection. Evidence was also sufficient for the jury to conclude that these were the kind of defects and/or safety violations that anyone familiar with that type of truck, and working in the industry would reasonably have been able to spot.

The evidence that was lacking, was any action on the part of Mountain Enterprises, Inc. to call into question whether the trucks were safe. Not only were there no inspections, but there is no evidence to suggest that there was ever even a hesitation on the part of Mountain Enterprises, Inc., to accept the performance of Galloway Trucking, or even question its safety practices. Mountain Enterprises, Inc., has attempted to distance itself from any responsibility for the trucks or for hauling the asphalt. However, in addition to making a profit on the hauling itself, evidence is sufficient to conclude that even if Mountain Enterprises, Inc., knew of no other defect or safety violation, they knew, or should have known, of the bald tires on the day of the accident. When Mountain Enterprises, Inc., loaded Mr. Kirk's truck on the day of the accident, they ratified and/or authorized Mr. Kirk's decision to drive, and Mr. Galloway's decision to let him drive. In doing so, they knew, or should have known, that an accident was a likely result. The fact that people would die, was not necessarily a given, but with a truck weighing in excess of sixty three thousand pounds, it was certainly a foreseeable consequence.

If the jury looked at the facts in this light, then certainly the loading of the truck, with dangerously bald tires that employees of Mountain Enterprises, Inc., may well have known about, was, in addition to being a clear authorization by Mountain to drive the truck, extremely reprehensible. Loading it in excess of the legal limit was even more reprehensible. Further, the fact that other trucks may well have come through, on other occasions, with other known

defects, and were similarly loaded, is also reprehensible. The fact that Mountain Enterprises, Inc., has, to this Court's knowledge, done nothing to change its practices, and thus may allow additional accidents in the future is further reprehensible.

Finally, this Court is not of the opinion that at any time, Mountain Enterprises attempted to make a fair and prompt settlement of this case. The issue of liability was taken away from the parties on October 26th, 2000 when this Court held as a matter of law that Mountain Enterprises, Inc. was liable for compensatory damages for the accident in this case. However, even after this operation of law, Mountain Enterprises, Inc., did not seem to accept any responsibility. At trial Counsel for Mountain Enterprises, Inc., made it clear to the Court and the jury that Mountain Enterprises, Inc., did not agree with the Court's ruling on liability, and seemed to do all but argue to the jury that the Court was incorrect. The Court accepts that this kind of evidence and argument, while perhaps pushing the envelope, was nevertheless proper as evidence of notice to Mountain Enterprises, Inc. as to its legal duty for purposes of punitive damages. However it also stands as an example of the posture Mountain Enterprises, Inc. took in this case, and presumably in its settlement negotiations.

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victims in this case. It should also be noted by the Court that Offers of Judgment were made to Counsel representing the estate of Leigh Ann Poindexter, and the second offer went up instead of down. This Court has no knowledge of the dynamics of the settlement negotiations, but is hard to escape the fact that the case in which the offers went up settled, and this case did not.

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Following this reasoning, it would seem that an offer of settlement by Mountain Enterprises, Inc., of at least three million four hundred thousand dollars ($3,400,000) would not be an unreasonable offer of settlement to make. Furthermore, given that the total verdict for compensatory damages returned in this case was nearly six million dollars ($6,000,000), an offer of three million dollars ($3,000,000) seems exceptionally low. This is especially true in light of the fact that Mountain Enterprises Inc., carried an insurance policy of approximately thirty million dollars ($30,000,000), more than enough to pay the verdict returned in this case, and certainly enough to cover a more generous offer of

settlement. This Court is certainly not going to, at this time, examine or address whether a three million dollar ($3,000,000) offer was unreasonably low, but it does seem clear to the Court that the offer was not such an effort toward prompt and fair settlement as to justify a reduction in the jury's award of punitive damages.

The Court can find nothing in its analysis of this factor that would justify a reduction of the six million dollar ($6,000,000) punitive damage award for this ground of punitive liability. Therefore, this factor weighs in favor of upholding the verdict.

> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

a. Billy D. Kirk.

Evidence presented at trial shows no profit to Mr. Kirk, other than his normal daily wage. The specific amount paid Mr. Kirk is unknown to the Court. But the Court believes it very unlikely that Mr. Kirk was paid anywhere near the ten thousand dollars ($10,000) which was assessed against him. Certainly on the day of the accident his salary for the day would not have been ten thousand dollars ($10,000). However, there is also no clear evidence as to how often Mr. Kirk may have driven a truck that was unsafe, as well as no evidence as to how much Mr. Kirk was paid for the entire time he was employed by Galloway Trucking. This being the case, it is difficult for the Court to conclude that the ten thousand dollar ($10,000) punitive award is excessive. Therefore, this factor weighs in favor of upholding the verdict.

b. Jerry Galloway for his own independent acts or omissions.

Evidence was not presented at trial to show how much profit Mr. Galloway may have made either on the day of the accident, or throughout the project with Mountain Enterprises, Inc. The jury was given evidence concerning the financial status of Mr. Galloway, and the sale of the trucks and other assets that had constituted Galloway Trucking. Given the evidence which was presented to the jury, it is difficult for the Court to conclude that the fifty thousand dollar ($50,000) punitive award for this ground of punitive liability was excessive. Therefore, this factor weighs in favor of upholding the verdict.

c. Jerry Galloway for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk.

Evidence was not presented at trial to show how much profit Mr. Galloway may have made either on the day of the accident, or throughout the project with Mountain Enterprises, Inc. The jury was given evidence concerning the financial status of Mr. Galloway, and the sale of the trucks and other assets that had constituted Galloway Trucking. Given the evidence which was presented to the jury, it is difficult for the Court to conclude that the fifty thousand dollar ($50,000) punitive award for this ground of punitive liability was excessive. Therefore, this factor weighs in favor of upholding the verdict.

d. Mountain Enterprises, Inc. for its own independent acts or omissions.

There was no evidence presented as to how much profit Mountain Enterprises made on the project during which Harley and Tyler Fitch were killed. However, the total contract price for the project was over close to ninety five thousand dollars ($95,000). Certainly, an award of six million dollars ($6,000,000) as was levied against Mountain Enterprises, Inc., was sufficient to remove the profit made on the project. This award also grants Plaintiffs punitive damages substantially in excess of any profit made. In fact, the award is more than six times the total contract price, or more than twelve times the contract price for the total punitive damages assessed against Mountain Enterprises, Inc. Therefore, this factor would tend to weigh in favor of Mountain Enterprises, Inc. being granted a reduction in the award of punitive damages for this ground of punitive liability.

e. Mountain Enterprises, Inc. for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk and/or Jerry Galloway.

There was no evidence presented as to how much profit Mountain Enterprises made on the project during which Harley and Tyler Fitch were killed. However, the total contract price for the project was over close to ninety five thousand dollars ($95,000). Certainly, an award of six million dollars ($6,000,000) as was levied against Mountain Enterprises, Inc., was sufficient to remove the profit made on the project. This award also grants Plaintiffs punitive damages substantially in excess of any profit made. In fact, the award is more than six times the total contract price, or more than twelve times the contract price for the total punitive damages assessed against Mountain Enterprises, Inc. Therefore, this factor would tend to weigh in favor of

Mountain Enterprises, Inc. being granted a reduction in the award of punitive damages for this ground of punitive liability.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

a. Billy D. Kirk.

Total compensatory damages in this case were just under six million dollars ($6,000,000). The punitive damage award levied against Mr. Kirk was ten thousand dollars ($10,000). This award of punitive damages is approximately one six-hundredth (1/600) of the compensatory award. In the face of a such a large compensatory verdict, it is difficult for the Court to find that a ten thousand dollar ($10,000) punitive award would be unfair as to being reasonably related to the compensatory damages. Therefore, this factor weighs in favor of upholding the verdict.

b. Jerry Galloway for his own independent acts or omissions.

Total compensatory damages in this case were just under six million dollars ($6,000,000). The punitive award levied against Mr. Galloway for this ground of punitive liability was fifty thousand dollars ($50,000), with the total of all punitive damages assessed against Mr. Galloway being one-hundred-thousand dollars ($100,000). The punitive award for this ground of punitive liability is approximately one one-hundred-twentieth (1/120) of the total compensatory damages. The total punitive award levied against Mr. Galloway is approximately one-sixtieth (1/60) of the total compensatory damages. Given such a large compensatory verdict, it is difficult for this Court to find that the fifty

thousand dollar ($50,000) punitive award for this ground of punitive liability was excessive. Therefore, this factor weighs in favor of upholding the verdict.

c. Jerry Galloway for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk.

Total compensatory damages in this case were just under six million dollars ($6,000,000). The punitive award levied against Mr. Galloway for this ground of punitive liability was fifty thousand dollars ($50,000), with the total of all punitive damages assessed against Mr. Galloway being one hundred thousand dollars ($100,000). The punitive award for this ground of punitive liability is approximately one one-hundred-twentieth (1/120) of the total compensatory damages. The total punitive award levied against Mr. Galloway is approximately one sixtieth (1/60) of the total compensatory damages. Given such a large compensatory verdict, it is difficult for this Court to find that the fifty thousand dollar ($50,000) punitive award for this ground of punitive liability was unfair as far as being reasonably related to the award of compensatory damages. Therefore, this factor weighs in favor of upholding the verdict.

d. Mountain Enterprises, Inc. for its own independent acts or omissions.

Total compensatory damages in this case were just under six million dollars ($6,000,000). The punitive damage award levied against Mountain Enterprises, Inc. for this ground of punitive liability was six million dollars ($6,000,000). This ratio between punitive damages and compensatory damages is approximately one-to-one. (1:1) The total award of punitive damages levied against Mountain Enterprises, Inc.,

was twelve million dollars ($12,000,000). The ratio between punitive damages and compensatory damages for the total award of punitive damages levied against Mountain is still only two to one (2:1).

In syllabus point fifteen (15) of TXO Production Corp. v. Alliance Resources Corp., 187 W. Va. 457 (1992), the West Virginia Supreme Court stated:

> The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.

While there is no evidence that Mountain Enterprises, Inc. acted with any real malicious or evil intent, there is very serious and grievous harm in this case. Two children are dead. This court believes that the approximate one-to-one (1:1) ratio for punitive damages, that the jury imposed on Mountain Enterprises for their own acts and/or omissions in this case, was not unfair as far as bearing a reasonable relationship to the award for compensatory damages. Certainly a one-to-one (1:1) or even a two to one (2:1) ratio for the total award of punitive damages levied against Mountain Enterprises, Inc., is well within the outer limit of five-to-one (5:1) that the Supreme Court set up in TXO. Therefore, the Court must conclude that the punitive damage award for this ground of punitive liability does bear a reasonable relationship to the award of compensatory damages, and this factor weighs in favor of upholding the verdict.

e. Mountain Enterprises, Inc. for expressly or

impliedly authorizing or ratifying the acts or omissions of Billy Kirk and/or Jerry Galloway.

Total compensatory damages in this case were just under six million dollars ($6,000,000). The punitive damage award levied against Mountain Enterprises, Inc. for this ground of punitive liability was six million dollars ($6,000,000). This ratio between punitive damages and compensatory damages is approximately one-to-one (1:1). The total award of punitive damages levied against Mountain Enterprises, Inc. was twelve million dollars ($12,000,000). The ratio between punitive damages and compensatory damages for the total award of punitive damages levied against mountain is still only two to one (2:1).

While there is no evidence that Mountain Enterprises, Inc. acted with any real malicious or evil intent, there is very serious and grievous harm in this case. Two children are dead. This court believes that the approximate one-to-one (1:1) ratio for punitive damages, that the jury imposed on Mountain Enterprises for expressly or impliedly authorizing and/or ratifying the actions of Mr. Kirk and/or Mr. Galloway, was not unfair as far as bearing a reasonable relationship to the award for compensatory damages. Certainly a one-to-one (1:1) or even a two-to-one (2:1) ratio for the total award of punitive damages levied against Mountain Enterprises, Inc. is well within the outer limit of five-to-one (5:1) that the Supreme Court set up in TXO. Therefore, the Court must conclude that the punitive damage award for this ground of punitive liability does bear a reasonable relationship to the award of compensatory damages, and this factor weighs in favor of upholding the verdict.

(5) The financial position of the defendant is relevant.

a. Billy D. Kirk.

The evidence presented at trial shows that Mr. Kirk has virtually no financial position. The evidence showed that he owned no real property, was working earning minimum wage, living in North Carolina, and at one point even borrowed transportation in order to get to the trial. The punitive award of ten thousand dollars ($10,000) levied against Mr. Kirk, while seeming extremely small in light of the deaths of the two children, also seems very well thought out, in light of Mr. Kirk's financial status. Ten thousand dollars ($10,000) is not so large an amount that he could not reasonably be expected to pay it, yet it is large enough that for a man in Mr. Kirk's position it is a very real punitive measure. The Court does not doubt that it will take Mr. Kirk some time and effort to satisfy the award levied against him, but the Court also thinks it to be an appropriate and reasonable award. Therefore, this factor weighs in favor of upholding the verdict.

b. Jerry Galloway for his own independent acts or omissions.

Evidence presented the Court concerning Mr. Galloway's financial position at the time of trial, indicates that Mr. Galloway had assets totaling approximately five hundred twenty-five thousand dollars ($525,000) with debt and/or other liabilities totaling one hundred forty-seven thousand, nine hundred dollars ($147,900). Mr. Galloway's net worth, or assets, minus liabilities would be three hundred seventy-seven thousand, one hundred dollars ($377,100).

It will undoubtedly be a hardship on Mr. Galloway to pay the fifty thousand dollar ($50,000) punitive award levied against him for this ground of punitive liability, and even more so to pay the total one hundred thousand dollar ($100,000) punitive award levied against him. However, this

Court believes that this award was very carefully considered by the jury. Much like the award levied against Mr. Kirk, it is an award large enough to be a true punishment for someone in Mr. Galloway's financial position, yet it is not so large that he could not reasonably be expected to pay it. Therefore, the Court believes that the punitive award levied against Mr. Galloway for this ground of punitive damages is appropriate, and that this factor weighs in favor of upholding the verdict.

c. Jerry Galloway for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk.

Evidence presented the Court concerning Mr. Galloway's financial position at the time of trial, indicates that Mr. Galloway had assets totaling approximately five hundred twenty-five thousand dollars ($525,000) with debt and/or other liabilities totaling one hundred forty-seven thousand, nine hundred dollars ($147,900). Mr. Galloway's net worth, or assets, minus liabilities would be three hundred seventy-seven thousand, one hundred dollars ($377,100).

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appropriate, and that this factor weighs in favor of upholding the verdict.

d. Mountain Enterprises, Inc. for its own independent acts or omissions.

Evidence presented the Court and the jury suggested that as of December 31, 1999, Mountain Enterprises, Inc. had assets totaling more than eighty million dollars ($80,000,000). Mountain Enterprises, Inc., had a total net equity, figured by subtracting all liabilities from the total assets, of almost twenty four million dollars ($24,000,000). From 1995 through 1999, the shareholders of Mountain Enterprises, Inc. took in dividends of one hundred million, fourteen thousand, five hundred fifty-five-dollars ($100,014,555), for an average of over twenty million dollars ($20,000,000) in dividends for each of the five years. Evidence also showed that at the end of each of those years, Mountain Enterprises, Inc. had an average of approximately sixteen million dollars ($16,000,000) in cash and temporary investments. Mr. Selby, Plaintiffs' financial expert, estimated the fair market value of Mountain Enterprises, Inc. to be at least seventy million dollars ($70,000,000), using a capitalized income method.

Unlike the awards levied against Mr. Kirk and Mr. Galloway, this is an award, which though substantially larger in amount, seems to be not so much of a hardship to bear. It is certainly unlikely that either Mr. Kirk or Mr. Galloway have the cash on hand to pay the punitive damage awards levied against them, but evidence suggests that Mountain Enterprises, Inc., does have sufficient cash on hand to pay the six million dollar ($6,000,000) award levied against it for this ground of punitive liability. In fact, evidence suggests that Mountain Enterprises Inc., has sufficient cash on hand to pay both six million dollar ($6,000,000) awards levied it.

Given the nature of the awards levied against all three Defendants, the Court believes that this award too, was very carefully considered by the jury. While the total contract price for the project in which Mountain Enterprises, Inc. was involved was less than one hundred thousand dollars ($100,000), merely taking the profit, or even an additional proportionate amount to that profit, away from a company that pays out dividends of an average of over twenty million dollars ($20,000,000), would hardly be a serious punishment. Even the six million dollars ($6,000,000) levied against Mountain Enterprises, Inc. for this ground of punitive liability, or the total twelve million dollars ($12,000,000) of both punitive awards levied against Mountain Enterprises Inc., is not as great a punishment as the awards levied against the other Defendants in this case, given their respective financial positions. However, the Court believes this may well be exactly what the jury intended, as the jury could certainly conclude that Mountain Enterprises, Inc.'s culpability and reprehensibility was less than the other Defendants.

The jury seems to have made a carefully considered determination, and levied an appropriate award for this ground of punitive damages. Therefore, this factor weighs in favor of upholding the verdict.

e. Mountain Enterprises, Inc. for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk and/or Jerry Galloway.

Evidence presented the Court and the jury suggested that as of December 31, 1999, Mountain Enterprises Inc. had assets totaling more than eighty million dollars ($80,000,000). Mountain Enterprises, Inc. had a total net equity, figured by subtracting all liabilities from the total

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The jury seems to have made a carefully considered determination, and levied an appropriate award for this ground of punitive damages. Therefore, this factor weighs in favor of upholding the verdict.

(6) The costs of the litigation.

a. Billy D. Kirk.

The West Virginia Supreme Court of Appeals has expressed a desire to encourage plaintiffs to bring wrongdoers to trial. With that goal in mind, one of the factors that may justify a larger punitive damage award is the cost of the litigation. In this trial, while the Court has no evidence of just what the actual litigation costs may be, it is apparent that they were substantial. The case was tried over a period of six weeks, requiring an enormous investiture of time for all parties concerned. The facts and issues in the case were numerous and complex, multiplying the time that all parties would have needed to spend in preparation. There were lengthy pre-trial hearings in addition to the trial itself, all of which required additional time to prepare for and attend. There were numerous experts rendering reports and testimony, including computer aided video reconstruction of the accident itself, all of which represents substantial litigation costs.

Even without actual figures of the specific costs for trial, the Court can confidently conclude that the cost of the

litigation was extremely high. Therefore, this factor weighs in favor of upholding the verdict.

b. Jerry Galloway for his own independent acts or omissions.

In this trial, while the Court has no evidence of just what the actual litigation costs may be, it is apparent that they were substantial. The case was tried over a period of six weeks, requiring an enormous investiture of time for all parties concerned. The facts and issues in the case were numerous and complex, multiplying the time that all parties would have needed to spend in preparation. There were lengthy pre-trial hearings in addition to the trial itself, all of which required additional time to prepare for and attend. There were numerous experts rendering reports and testimony, including computer aided video reconstruction of the accident itself, all of which represents substantial litigation costs.

Even without actual figures of the specific costs for trial, the Court can confidently conclude that the cost of the litigation was extremely high. Therefore, this factor weighs in favor of upholding the verdict.

c. Jerry Galloway for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk.

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d. Mountain Enterprises, Inc. for its own independent acts or omissions.

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e. Mountain Enterprises, Inc. for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk and/or Jerry Galloway.

In this trial, while the Court has no evidence of just what the actual litigation costs may be, it is apparent that they were substantial. The case was tried over a period of six weeks, requiring an enormous investiture of time for all parties concerned. The facts and issues in the case were numerous and complex, multiplying the time that all parties would have needed to spend in preparation. There were lengthy pre-trial hearings in addition to the trial itself, all of which required additional time to prepare for and attend. There were numerous experts rendering reports and testimony, including computer aided video reconstruction of the accident itself, all of which represents substantial litigation costs.

Even without actual figures of the specific costs for trial, the Court can confidently conclude that the cost of the litigation was extremely high. Therefore, this factor weighs in favor of upholding the verdict.

(7) Any criminal sanctions imposed on the defendant for his conduct.

a. Billy D. Kirk.

The Supreme Court has stated that any criminal sanctions should mitigate the award of punitive damages. Mr. Kirk pled guilty to a charge of negligent homicide, and has since successfully completed his sentence. Mr. Kirk appeared to cooperate in every way concerning this accident, and the criminal punishment for it, and appeared to the Court to show very genuine remorse. Certainly Mr. Kirk's conduct subsequent to the accident and his plea to negligent homicide weigh in favor of reducing the ten thousand dollar ($10,000) punitive damage award levied against him.

b. Jerry Galloway for his own independent acts or omissions.

Mr. Galloway pled *nolo contendere* to the charge of attempting to commit a felony. Mr. Galloway's *nolo contendere* plea weighs less favorably with the Court than would have a plea of guilty, as was the case with Mr. Kirk. Unlike Mr. Kirk, a *nolo contendere* plea takes no responsibility for the act, but merely agrees not to contest the charge. Even so, it does carry a penalty and that can mitigate the punitive damage award to some degree. Therefore, this factor weighs in favor of some lessening of the punitive damage award.

c. Jerry Galloway for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk.

Mr. Galloway pled *nolo contendere* to the charge of attempting to commit a felony. Mr. Galloway's *nolo contendere* plea weighs less favorably with the Court than would have a plea of guilty, as was the case with Mr. Kirk. Unlike Mr. Kirk, a *nolo contendere* plea takes no responsibility for the act, but merely agrees not to contest the charge. Even so, it does carry a penalty and that can mitigate the punitive damage award to some degree.

Therefore, this factor weighs in favor of some lessening of the punitive damage award.

d. Mountain Enterprises, Inc. for its own independent acts or omissions.

Mountain Enterprises, Inc., nor any of its officers or employees, have suffered criminal sanctions. Therefore, this factor weighs in favor of upholding the verdict.

e. Mountain Enterprises, Inc. for expressly or

impliedly authorizing or ratifying the acts or omissions of Billy Kirk and/or Jerry Galloway.

Mountain Enterprises, Inc., nor any of its officers or employees, have suffered criminal sanctions. Therefore, this factor weighs in favor of upholding the verdict.

(8) Any other civil actions against the same defendant, based on the same conduct.

a. Billy D. Kirk.

There was an additional Plaintiff in this case originally, representing the estate of Leigh Ann Poindexter. Prior to the case beginning trial, the Court bifurcated the trial between the two Plaintiffs. After having picked a jury, but before the presentation of evidence, the case on behalf of Mrs. Poindexter was settled for one million, seven hundred thousand dollars ($1,700,000). This would tend, under our analysis, to suggest an offset might be appropriate from this award of punitive damages. However, the one million, seven hundred thousand dollar ($1,700,000) settlement is only a little over half what was awarded for each of the children in compensatory damages. It is hard for the Court to then say that this prior settlement, being extremely low in relation to what the jury returned even on compensatory damages, should offset the current award of punitive damages. Therefore, the Court believes that this factor weighs neither in favor of upholding the verdict nor in lowering the verdict.

b. Jerry Galloway for his own independent acts or omissions.

There was an additional Plaintiff in this case originally, representing the estate of Leigh Ann Poindexter. Prior to the case beginning trial, the Court bifurcated the trial between the two Plaintiffs. After having picked a jury, but before the presentation of evidence, the case on behalf of Mrs. Poindexter was settled for one million, seven hundred thousand dollars ($1,700,000). This would tend, under our analysis, to suggest an offset might be appropriate from this award of punitive damages. However, the one million, seven hundred thousand dollar ($1,700,000) settlement is only a little over half what was awarded for each of the children in compensatory damages. It is hard for the Court to then say that this prior settlement, being extremely low in relation to what the jury returned even on compensatory damages, should offset the current award of punitive damages. Therefore, the Court believes, that this factor weighs neither in favor of upholding the verdict nor in lowering the verdict.

c. Jerry Galloway for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk.

There was an additional Plaintiff in this case originally, representing the estate of Leigh Ann Poindexter. Prior to the case beginning trial, the Court bifurcated the trial between the two Plaintiffs. After having picked a jury, but before the presentation of evidence, the case on behalf of Mrs. Poindexter was settled for one million, seven hundred thousand dollars ($1,700,000). This would tend, under our analysis, to suggest an offset might be appropriate from this award of punitive damages. However, the one million, seven hundred thousand dollar ($1,700,000) settlement is only a little over half what was awarded for each of the children in compensatory damages. It is hard for the Court to then say that this prior settlement, being extremely low in relation to

what the jury returned even on compensatory damages, should offset the current award of punitive damages. Therefore, the Court believes, that this factor weighs neither in favor of upholding the verdict nor in lowering the verdict.

d. Mountain Enterprises, Inc. for its own independent acts or omissions.

There was an additional Plaintiff in this case originally, representing the estate of Leigh Ann Poindexter. Prior to the case beginning trial, the Court bifurcated the trial between the two Plaintiffs. After having picked a jury, but before the presentation of evidence, the case on behalf of Mrs. Poindexter was settled for one million, seven hundred thousand dollars ($1,700,000). This would tend, under our analysis, to suggest an offset might be appropriate from this award of punitive damages. However, the one million, seven hundred thousand dollar ($1,700,000) settlement is only a little over half what was awarded for each of the children in compensatory damages. It is hard for the Court to then say that this prior settlement, being extremely low in relation to what the jury returned even on compensatory damages, should offset the current award of punitive damages. Therefore, the Court believes, that this factor weighs neither in favor of upholding the verdict nor in lowering the verdict.

e. Mountain Enterprises, Inc. for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk and/or Jerry Galloway.

There was an additional Plaintiff in this case originally, representing the estate of Leigh Ann Poindexter. Prior to the case beginning trial, the Court bifurcated the trial between the two Plaintiffs. After having picked a jury, but before the

presentation of evidence, the case on behalf of Mrs. Poindexter was settled for one million, seven hundred thousand dollars ($1,700,000). This would tend, under our analysis, to suggest an offset might be appropriate from this award of punitive damages. However, the one million, seven hundred thousand dollar ($1,700,000) settlement is only a little over half what was awarded for each of the children in compensatory damages. It is hard for the Court to then say that this prior settlement, being extremely low in relation to what the jury returned even on compensatory damages, should offset the current award of punitive damages. Therefore, the Court believes, that this factor weighs neither in favor of upholding the verdict nor in lowering the verdict.

> (9) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

a. Billy D. Kirk.

This Court has already discussed both of these issues in previous factors of its analysis. In summary, the Court believes that Mr. Kirk did make reasonable efforts to settle this case, and it is obvious that the cost of litigation was extremely high. In the Court's analysis of this factor, the Court must conclude that this factor weighs neither in favor of upholding the verdict, nor in favor of lowering it.

b. Jerry Galloway for his own independent acts or omissions.

This Court has already discussed both of these issues in previous factors of its analysis. In summary, the Court believes that Mr. Galloway did make reasonable efforts to

settle this case, and it is obvious that the cost of litigation was extremely high. In the Court's analysis of this factor, the Court must conclude that this factor weighs neither in favor of upholding the verdict, nor in favor of lowering it.

c. Jerry Galloway for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk.

This Court has already discussed both of these issues in previous factors of its analysis. In summary, the Court believes that Mr. Galloway did make reasonable efforts to settle this case, and it is obvious that the cost of litigation was extremely high. In the Court's analysis of this factor, the Court must conclude that this factor weighs neither in favor of upholding the verdict, nor in favor of lowering it.

d. Mountain Enterprises, Inc. for its own independent acts or omissions.

This Court has already discussed both of these issues in previous factors of its analysis. In summary, the Court believes that Mountain Enterprises, Inc. did not make reasonable efforts to settle this case, and it is obvious that the cost of litigation was extremely high. Therefore, the Court believes that this factor weighs in favor of upholding the verdict.

e. Mountain Enterprises, Inc. for expressly or impliedly authorizing or ratifying the acts or omissions of Billy Kirk and/or Jerry Galloway.

This Court has already discussed both of these issues in previous factors of its analysis. In summary, the Court believes that Mountain Enterprises, Inc. did not make reasonable efforts to settle this case, and it is obvious that the cost of litigation was extremely high. Therefore, the Court believes that this factor weighs in favor of upholding the verdict.

IV. Findings of Fact and Conclusions of Law

The Court has very carefully considered and weighed all of the evidence before it, all papers of record, arguments of counsel, and applicable legal provisions. Wherefore, the Court does hereby make the following findings of fact and conclusions of law:

(1) That all findings and conclusions from this Court's Amended Memorandum Order regarding punitive damages entered during the course of the trial, are hereby adopted an incorporated by reference;

(2) That the "Discussion" section above is hereby adopted and incorporated by reference into these Findings of Fact and Conclusions of Law;

(3) That submitting the issue of punitive damages to the jury was correct and proper in light of the law of this state, and the evidence presented at trial;

(4) That the jury's verdict was not ambiguous, but rather a carefully considered award based on the evidence presented them;

(5) That the Court's verdict form was not ambiguous or misleading, such that the jury would have had difficulty, or been confused as to what they were asked to do;

(6) That the Court's instructions regarding the verdict form were explicit and sufficient to have cleared up any misunderstanding the jury may have had regarding the two (2) different lines for Defendants, Jerry Galloway and

Mountain Enterprises, Inc. resulting from two (2) separate grounds for punitive liability;

(7) That there was no double recovery in this case, but rather five (5) separate awards of punitive damages, all based on separate grounds for punitive liability, and while all arise from the same accident, each award is based on distinctly different and separate conduct of Mr. Galloway and Mountain Enterprises, Inc., leading up to the accident;

(8) That in carefully weighing all factors set forth in Garnes, the Court is of the opinion that the weight of the factors goes toward upholding the jury's award of punitive damages against Defendant Kirk, the truck driver. The Court believes that the award was well thought out and carefully crafted to punish Mr. Kirk for his actions or omissions, while balancing his financial status, and good faith attempts to make amends. The Court believes the award to be equitable, just and fair, and will not disturb it;

(9) That in carefully weighing all factors set forth in Garnes, the Court is of the opinion that the weight of the factors goes toward upholding the jury's award of punitive damages against Defendant Galloway, owner of Galloway Trucking, for his independent acts or omissions. The Court believes that the award was well thought out and carefully crafted to punish Mr. Galloway for his separate and distinct actions and/or omissions, while balancing his financial status, and good faith attempts to make amends. The Court believes the award to be equitable, just and fair, and will not disturb it;

(10) That in carefully weighing all factors set forth in Garnes, the Court is of the opinion that the weight of the factors goes toward upholding the jury's award of punitive damages against Mr. Galloway for his implicitly or explicitly authorizing or ratifying the actions and/or omissions of Mr. Kirk, his driver. The Court believes that the award was well thought out and carefully crafted to punish Mr. Galloway for his actions, while balancing his financial status, and his

company's good faith attempts to make amends. The Court believes the award to be equitable, just and fair, and will not disturb it;

(11) That in carefully weighing all factors set forth in Garnes, the Court is of the opinion that the weight of the factors goes toward upholding the jury's award of punitive damages against Mountain Enterprises, Inc., as the contractor, for its own independent acts or omissions. The Court believes that the award was well thought out and carefully crafted to punish Mountain Enterprises, Inc. for its separate and distinct acts or omissions. The jury seemed to carefully consider the financial position of Mountain Enterprises, Inc. and enter an award that would be a punishment, but not the same degree of hardship respectively levied against Defendants Kirk and Galloway. Further, the Court was unimpressed by Mountain Enterprises Inc.'s attempts to settle the case, even after the issue of liability for compensatory damages was determined as a matter of law. Mountain Enterprises, Inc. carries insurance more than sufficient to cover all punitive damages that were levied against them, and could certainly have covered a more generous settlement offer. The Court believes the award to be equitable, just and fair, and will not disturb it;

(12) That in carefully weighing all factors set forth in Garnes, the Court is of the opinion that the weight of the factors goes toward upholding the jury's award of punitive damages against Mountain Enterprises, Inc. for implicitly or explicitly authorizing and/or ratifying the acts of Mr. Kirk and/or Mr. Galloway. Given the limited ability of the Court to ascertain some insight into the jury's deliberations, the Court believes that the award was well thought out and carefully crafted to punish Mountain Enterprises, Inc. for its complicity in the events that led up to the accident, and their part in it. The jury appears to have carefully considered the financial position of Mountain Enterprises, Inc. and entered an award that would be an appropriate punishment to

Mountain Enterprises, Inc, but not the same degree of hardship respectively levied against Defendants Kirk and Galloway. Further, the Court was unimpressed by Mountain Enterprises Inc.'s attempts to settle the case, even after the issue of liability for compensatory damages was determined as a matter of law. Mountain Enterprises, Inc. carries insurance more than sufficient to cover all punitive damages that were levied against them, and could certainly have covered a more generous settlement offer. The Court believes the award to be equitable, just and fair, and can find no reason to disturb it; and,

(13) That the Court notes for the record the objections and exceptions of all parties that are adversely affected by the Court's ruling.

All of which is hereby ADJUDGED, ORDERED and DECREED.

The Clerk of this Court is hereby ORDERED to provide a certified copy of this Order to all parties of record and counsel for each, by USPS First Class Mail, hand delivery, or telefax communication.

Entered this 21st day of December, 2001 A.D.

_____

Judge Jay M. Hoke

APPENDIX F

[TRIAL COURT ORDER DENYING POST-VERDICT MOTIONS]
[UNPUBLISHED]

IN THE CIRCUIT COURT
OF LINCOLN COUNTY,
WEST VIRGINIA:

DANIEL R. FITCH, and ADAM PLUMLEY, Co-Administrators of the Estates of Harley Fitch and Tyler Fitch, deceased and DANIEL R. FITCH, individually,

Plaintiffs,

v. CIVIL ACTION NO. 99-C-86

MOUNTAIN ENTERPRISES, INC., d/b/a Lenore Asphalt, Inc., a Kentucky corporation, JERRY GALLOWAY, individually and d/b/a Galloway's Trucking, and BILLY D. KIRK,

Defendants.

ORDER
DENYING MOTIONS FOR NEW TRIAL AND
GRANTING CERTAIN
OTHER RELIEF

Procedural Posture

This matter came before the Court on the ___th day of April, 2002, for hearing on Defendants' Motion(s) for a New Trial, Motion(s) for Judgment as a Matter of Law, as well as various other motions, pursuant to and in accordance with the applicable provisions of Rules 50 and 59 of the West Virginia Rules of Civil Procedure, and the other case-cited authorities. This hearing came after the Court's entry of its

Trial Order and Final Judgment Order entered January 31, 2002, and following its entry of the Court's Order on Garnes Review of Punitive Damages on December 21, 2001. All parties were present and represented by their respective counsel, with all counsel having the opportunity to participate in arguing in support of, or in opposition to, all such Motions. Defendants Mountain Enterprises, Inc. (hereinafter Defendant Mountain), Jerry Galloway doing business as Galloway Trucking (hereinafter Defendant Galloway), and Billy D. Kirk (hereinafter Defendant Kirk) all filed motions for a new trial with the Court. Defendant Kirk also filed a motion for sanctions against Mountain Enterprises. In terms of analysis, then, each motion will be addressed *in seriatim by* the Court, given the very lengthy record, the various Motions, certain changes in counsel and the alternative remedies available to the Court.

Discussion of Facts and Law

Introduction

As a preface to the discussion of this case, the Court notes several factors that must be plainly stated, and continually taken into consideration by the respective parties to this litigation, as well as any reviewing Court's review and understanding of this Court's order. First, and foremost, this case is based upon a stark and undeniable **tragedy**, the deaths of three (3) human beings, a mother and her two (2) small children, who were traveling down a two-lane highway in rural Lincoln County, West Virginia, when they were forcefully struck and subsequently killed by an over-loaded truck, with criminally bald tires, carrying "hot-mix" asphalt in an amount that violated the governing statute. Those are ever-present facts, for there was never any escaping them from the filing of this case, through the years preceding this trial, and through the weeks and weeks of the trial process

commencing on May 21, 2001 and continuing through until being completed on June 27, 2001.

Second, and equally stark and undeniable, is the clear and ever present fact that it was all **preventable.** The criminal conviction of Defendant Kirk establishes that it was preventable, as does the criminal conviction of Defendant Galloway. As the truck driver, Defendant Kirk, in this case testified from the witness box during his cross-examination, it was all preventable. If he had said "No" to his employer's instructions to drive or go home, this tragedy would not have happened. If his immediate employer, Defendant Galloway Trucking, had said "Yes" to Kirk's pleas to have the truck's tires changed, this tragedy would not have happened. If the general contractor and employer of Defendant Galloway Trucking, Defendant Mountain Enterprises, had said "No" to loading the truck with its criminally bald tires, or, had said "No" to over-loading the truck with its criminally bald tires, this tragedy would not have happened. Given the ability of any of the Defendants to have prevented this tragedy, then, Defendant Kirk testified that they must all be held accountable.

Moreover, it is clearly evident from the jury's verdict that the jury believed Defendant Kirk, and held all of the Defendants accountable. The verdict holds all Defendants accountable, to the degree and to the extent, that the jury determined that they should be held accountable, after it had heard weeks and weeks of testimony of lay and expert witnesses; after it had reviewed dozens and dozens of exhibits; and after it had heard and considered the legal points and arguments of all of the parties.

Third, and probably the most complicating factor throughout the entire litigation process, was the degree of non-cooperation and continual conflict among counsel, and then as the case evolved toward the trial and its conclusion it was the conduct of Mountain's counsel, even with the Court.

All of this, it became clear, was for no other end purposes than to create needless delay in this litigation and the creation of needless costs and expenses for the other parties. During the litigation process, there were abrasive comments continuously between Defendant Mountain's counsel and Plaintiffs' counsel, which grew stronger with time. Over time, as well, the degree of hostility clearly inhibited the proper functioning of the process, with this animosity slowing and increasing the costs of this case. Examples of such were depositions which could not be held except by Court order, and then when scheduled by Court order, the Defendant Mountain's witnesses not appearing after the other parties were forced to travel out-of-state; Defendant Mountain making offers of judgment, and then rescinding them irrespective of the provisions of WVRCP Rule 68; groundless motions for disqualification, which came in non-compliance with the mandatory provisions of Rule 17.01 of the West Virginia Trial Court Rules; questionable motions for mistrial, one of which the Court granted out of an abundance of caution toward assuring a fair and impartial trial jury for the Defendants, which was followed by groundless motions for mistrial. While there are numerous other examples that the Court can point to that are illustrative of this factor, the most recent is indicative of Defendant Mountain's approach to this entire litigation. Irrespective of the mandatory provisions of WVTCR Rule 4.09 on contact with jurors, Defendant Mountain hired a private detective to interview jurors on this case, after this Trial was completed but while the jurors were still sitting on the panel and potentially available to serve. The impact on the Court system was to place an entire panel's service in jeopardy until the conclusion of the term in which they were sitting, with the resulting costs and expenses associated therewith.

Within the context of the tragedy described above, and with the Court being very sensitive throughout the entirety of this litigation of the need to provide a fair and impartial trial

to all of the parties in this case, the Court continually admonished the parties on the record and in its orders regarding their need to comply with the rules and cooperate with one another, and in response to the multiple requests for sanctions warned Defendant Mountain that the Court would consider and address these issues at the conclusion of the case.

Therefore, it is within the perspective provided by the factors set forth above that the Court now turns to the respective points raised by the parties in support of, and in opposition to, the various motions argued hereinafter.

A. Rule-based Standard of Review

In regard to the various Motions for New Trial, the provisions of WVRCP Rule 59 state as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity.

As is evident from a cursory review of the Rule governing New Trial Motions, the standards for the determination of such are outlined in the case law authorities. Here, the Court takes notice of our Supreme Court's holdings in various cases, such as In Re State Public Building Asbestos Litigation, 193 W. Va. 119 (1994); Tennant v. Marion Health Care Foundation, 194 W. Va. 97 (1995); Morrison v. Sharma, 200 W. Va. 192 (1997), and Brooks v. Harris, 201 W. Va. 184 (1997), all of which are recent cases and all of which stand for the same standard of review, that being an abuse of discretion standard. In those cases, our Court reiterated that:

> A motion for a new trial is governed by a different standard than a motion for a directed verdict (e. g. "Judgment as a Matter of Law"). When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the *West Virginia Rules of Civil Procedure,* the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based upon false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

Within that same analysis, however, our Court has also held in Maynard v. Adkins, 193 W. Va. 456 (1995) and Witt v. Sleeth, 198 W. Va. 398 (1996), as follows:

> ...consistent with *Asbestos Litigation,* on the other hand, is the general principle that the judgment of a trial court in awarding a new trial should be reversed ... if a consideration of the evidence shows that the case was a proper one for jury determination. (See Maynard, *op cit)*
>
> Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court acted under some misapprehension of the law or the evidence. (see Witt, *op cit)*

Given the pending motions made to reconsider the Court's rulings made prior to trial on its WVRCP Rule 56(c) Summary Judgment determinations, on its determinations on motions *in limine,* together with other motions made during the trial, and in light of the voluminous proposed instructions

of law submitted by the parties, the Court took great care to consider the evidence adduced by the parties in the presence of the jury, reviewed the exhibits offered both before trial and during the trial, both in the presence of the jury and outside the presence of the jury, inquired of witnesses, as authorized and governed by Rule 614 of the West Virginia Rules of Evidence, both in the presence of the jury and outside the presence of the jury, and entertained offers of proof. During that entire process, the Court continuously weighed the evidence and considered the credibility of the witnesses (see Asbestos Litigation, Tennant, Morrison, and Brooks, *op cit).* Following that entire process, the Court is of the opinion that it is necessary and proper to apply the analytical frame-work established by our Supreme Court in the case authorities cited above (see also Maynard and Witt, *op cit).* Employing that frame-work, then, the Court has determined comprehensively that:

> (A) That the verdict is NOT against the clear weight of the evidence;
>
> (B) That the verdict is NOT based upon false evidence;
>
> (C) That the verdict will NOT result in a miscarriage of justice;
>
> (D) That this case WAS one from its inception for jury determination; and,
>
> (E) That the trial court was NOT acting under some misapprehension of the law or the evidence.

Given the immediately preceding factor, whether or not the Court was acting under some misapprehension of the law or the evidence, it is proper at this point to tie in a discussion of the operable provisions of WVRCP Rule 50, particularly Rule 50(b), which state as follows:

> ...The movant may renew the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59.

When Rules 50 and 59 are viewed synoptically, then, it appears that any standards for the granting or denial of such "grounds" for relief will, necessarily, be predicated upon the appropriate case authorities. Given this determination, the Court then must turn necessarily to the respective party's arguments and the case authorities cited therein.

B. Defendants' Motions

Defendant Mountain's Motion for New Trial

The Defendant Mountain Enterprises Inc. has set forth thirteen (13) points of error, which it argues justify the Court granting a new trial. Given the Court's stated approach, each point of error will be discussed individually.

1. That the Court erred in submitting the question of punitive damages to the jury, in regard to Mountain's direct actions or failures to act, and in not granting Mountain Enterprises Motion for Judgment as a Matter of Law in that regard.

Defendant Mountain contends that it was improper to submit the question of punitive damages to the jury under either of the theories permitted by the Court: (1) in regard to Mountain's direct willful acts, or Mountain's failure to act; and (2) in regard to Defendant Mountain's implicit or explicit ratification of the acts or omissions of Galloway or Kirk. Defendant Mountain further points to specific errors that it believes the Court made in submitting punitive damages to the jury on a theory of Defendant Mountain's direct acts or omissions. Those are: (1) that Mountain lacked notice of its legal duty to protect the public safety outside the actual

project site; and (2) that Mountain did not act with the requisite willful, wanton, or reckless conduct sufficient to allow an award of punitive damages.

Mountain's argument that it did not have notice of its duty to protect the public outside the actual job site is not well received by the Court. As a matter of public policy Mountain Enterprise has a duty to protect the public at any point, and during any operation, over which it exerts its control. There was evidence adduced at trial sufficient to conclude that Mountain did, in fact, exercise a great degree of control over hauling of the asphalt, and not merely the loading of the asphalt at the plant and its use at the ultimate job site. Evidence suggested that Mountain had a say in who was hired to haul asphalt, what time they reported to work, what route they drove in delivering the asphalt, and how much asphalt was loaded into each truck. Evidence was also sufficient to conclude that was no contract of any kind in effect between Mountain and Galloway, thus in effect making Galloway's employees, Mountain employees. In further support of this, Mountain made a profit on Galloway's hauling of the asphalt, just as if it was another operation of Mountain, rather than an expense it contracted out to Galloway. It seems clear to the Court, both as a matter of law as well as public policy, that if a company is going to make profits by exerting a substantial degree of control over some aspects of business, it correspondingly acquires a clear legal and public policy-based duty to ensure that that aspect of business is conducted safely.

Furthermore, Defendant Mountain signed a contract with the State of West Virginia's Department of Transportation/Division of Highways, in which Defendant Mountain expressly undertook various legal commitments, including the obligation of ensuring the public safety throughout all aspects of its operations. Despite the legal assertions of Defendant Mountain to the contrary, the Court has previously concluded as a matter of law, continues to

find that the contract's language is clear and unambiguous, and sufficient to estop Mountain from now claiming that they had no notice that they had a duty to ensure the public safety at any point away from the job site.

Second, whether Mountain acted, or failed to act when it had a duty to act, with the requisite conduct is a question of fact for the jury. That standard of conduct is not merely "willful, wanton or reckless conduct", but additionally includes, and the Court instructed upon, the elements of the "criminal indifference to civil obligations affecting the rights of others" (see Kessel v. Levitt, 204 W. Va. 95 (1998), citing historical lines of authority). It was whether these elements were established sufficiently to justify an award of punitive damages, and is again a question of fact to be determined by the jury (see also the Court's Garnes Order on its punitive damages review). Both the Plaintiff and other Defendants introduced sufficient evidence of Mountain's acts and omissions to justify the presentation of the question of punitive damages to the jury. (The reasoning behind and evidence supporting the submission of punitive damages to the jury has been more fully discussed in the Court's Memorandum Order on Punitive Damages, entered during trial.). The jury had the opportunity to hear and weigh the evidence and issue what they believed to be a fair and impartial verdict. Given the evidence adduced at trial, and the reasonable inferences that could be drawn therefrom, the Court does not believe that submission of the question of punitive damages was improper. Furthermore, as more fully set out in the Court's Order regarding the review of punitive damages, carefully weighing all the factors, the Court does not believe the award to be excessive.

When all of these grounds are taken into consideration, the Court does not believe that this presents grounds sufficient to grant a new trial, in that the jury heard the evidence, applied the law properly from the Court's instructions, and arrived at a fair and impartial verdict.

2. That Mountain could not have ratified the conduct of either Galloway or Kirk, in such a manner as to warrant punitive damages, as Mountain: (1) had no notice of the conduct; and (2) the conduct was not ratified by a high-level Mountain employee.

Mountain contends that it had no knowledge of the conduct of either Kirk or Galloway, sufficient to make it possible to ratify those actions. On the legal issue of the express or implicit ratification of the actions of others sufficient for the jury's assessment of punitive damages, the Court noted its conclusion that the law is, and has been, clear and settled for over a century (see Court's previous orders citing authorities). In regard to the factual basis, however, there was testimony adduced at trial which supported very plainly that several Defendant Mountain's employees, both at the truck loading area and at the job site, had opportunity to view Kirk's truck, the defects of the truck and its bald tires, all of which would have been plainly visible to anyone in the industry. Defendant Galloway even adduced evidence on this point. Furthermore, there was evidence from Defendant Kirk that Kirk had complained to, or in the presence of, Defendant Mountain's employees regarding the state of his truck and tires, and Defendant Mountain could have found out that way. Again, whether or not Mountain had actual knowledge of the condition of the truck being driven by Defendant Kirk, and the condition of Galloway's trucks in the past, is a question of fact for the jury. The evidence at trial was sufficient to allow them to conclude that Mountain did, in fact, know of the problems with Kirk's truck specifically, and Galloway's trucks in general. The jury had the opportunity to hear both sides present evidence on this matter and decide which was most credible. The Court will not now look beyond that.

Second, in regard to Mountain's argument that only a high level employee can ratify the actions of Defendant Kirk or Defendant Galloway Trucking, the Court believes that

evidence was sufficient, both from his testimony at trial as well as his impeachment from his deposition testimony, to support a clear inference that the supervisor of the asphalt plant knew of the condition of Kirk's truck specifically and Galloway's trucks in general, but did not care to do anything about it. Evidence was also sufficient to conclude that Kirk's truck specifically and Galloway's trucks in general had several mechanical defects which would have been apparent to anyone in the industry who saw those trucks, and that a great many Mountain employees, some of whom would have been reasonably high-level employees, had opportunity to see those trucks and thus would have been aware of the defects. Further, it is also necessary to revisit the context or perspective of the legal relationship of Defendant Galloway Trucking, that operated the defective truck and its bald tires, and Defendant Mountain. By the testimony of Defendant Mountain's chief financial officer, its corporate treasurer, Defendant Mountain either overtly knew, or should have known, that there was no express, written contract in existence between the two Defendants, Galloway Trucking and Mountain Enterprises. The importance of the absence of this express, written contract between the two defendants cannot be over-emphasized, given the legal lines of authority, accountability and liability operating between the parties. Irrespective of the grounds previously argued on the issue of "independent contractor", the absence of this express, written contract as a legal fact not only was dispositive of the "independent contractor" defense that Mountain continuously attempted to assert throughout this litigation, but also impacts each element on liability for compensatory and punitive damages that is necessary to be established by the applicable evidentiary standards and to the satisfaction of the jury.

These are all, nevertheless, questions of fact. The jury had the opportunity to hear and weigh the evidence and issue what they believed to be a fair and impartial verdict. Given the evidence adduced at trial, and the reasonable inferences

that could be drawn therefrom, the Court does believe that the jury could reasonably conclude that a high-level Mountain employee had knowledge of the acts of Kirk and Galloway, sufficient to ratify their conduct.

As a result of all of the above, the Court does not believe that this presents grounds sufficient to grant a new trial.

3. That the Jury's award of punitive damages was against the clear weight of the evidence.

The facts and circumstances regarding the jury's award of punitive damages has been more fully set out in the Court's Order previously entered following its review of the punitive damages award, in accordance with the Garnes factors. Suffice it to say, however, that the evidence adduced at trial from all of the respective parties' witnesses, and not merely the Plaintiffs, all of which the jury carefully considered, was clearly sufficient to support an award of punitive damages against each and every Defendant, based upon how the jury weighed and gave credit to the respective parties' evidence.

Again, the Court does not believe that this presents grounds sufficient to grant a new trial.

4. That the Court erred in not allowing Mountain to assert the Independent Contractor's defense.

The Court very carefully considered this question and discussed fully the applicability of the "independent contractor" defense in this case, in its Summary Judgment Order entered October 26, 2000. Reiterating here all of the Court's rationale would serve no reasonable purpose.

In that the Court has referenced it above, however, the Court should emphasize that additional facts were introduced at trial that further support the Court's conclusion that the "independent contractor" defense was unavailable to Mountain. Particularly, it was made clear at trial by the Defendants' witnesses that Defendant Mountain had no

legally effective contract with Galloway, and had not had one for some time. In response to a motion from Defendant Galloway Trucking on that issue, specifically, the Court entered an Order so finding, based upon the evidence adduced from the Defendants and from the law applicable.

Thus, based upon the evidence and the law, it is clear that Defendant Mountain Enterprises continued to employ Defendant Galloway Trucking in the hauling of its "hot mix" asphalt in an undeniably **dependent** contractor relationship. There was also sufficient evidence adduced from the Defendant Mountain's corporate witnesses to support the inference by the jury that Mountain had merely created this general contractor-subcontractor relationship as means of lowering its transportation costs (particularly based upon Davis-Bacon federal wage requirements), while yet maintaining the ability to exert substantial control over the trucking services from Mountain's asphalt plant to Mountain's job site. While lowering its costs and increasing its profits (which are absolutely proper business objectives) on the trucking services, it also attempted to insulate itself from any liability generated by the trucking services, thereby being able to "delegate" such legal responsibility, accountability and liability by the use of such "independent contractors" (which were not proper legal objectives, given the contractual provisions in the DOT/DOH contract).

Within this context, even if the Court is incorrect in its determinations that as a matter of law, under the DOT/DOH contract, such a delegation of duty is proper, there must be a legally effective contract in existence sufficient to establish Defendant Galloway Trucking as this "independent contractor". As noted by its motion, based upon the evidence and the law, even Defendant Galloway believes there is none. Furthermore, the conduct in regard to Galloway and his employees, throughout their employment by Mountain, by was unquestionably more akin to an employer-employee relationship, rather than that of an independent contractor by

a general contractor. Specifically, the conduct in regard to the significant amount of control Mountain exercised over Galloway trucks, its employees, their actions, as well as the profit Mountain made from using Galloway on hauling each load of asphalt, all point to some relationship other than that of an independent contractor. In that respect, it allowed Galloway Trucking to operate in non-compliance with its standard contractual requirements for "independent contractors", such as the required amount of insurance being double that carried by Defendant Galloway, that Defendant Mountain had imposed upon all its other trucking companies. When all of the evidence is considered in its whole, the jury's verdict is clearly supported.

Regardless of what may have been intended at the beginning of the business relationship, it is undeniable that Galloway Trucking was not an "independent contractor" on the date of the accident.

Again, the Court does not believe that this presents grounds sufficient to grant a new trial.

5. That as Galloway was an independent contractor of Mountain, Mountain was not vicariously liable for compensatory damages, nor was Mountain directly liable for any compensatory damages.

Defendant Mountain argues that Galloway was an "independent contractor", and thus they were not vicariously liable for compensatory damages. However, as the Court has addressed the issue of whether or not Galloway Trucking was an "independent contractor", and concluded that undeniably Defendant Galloway Trucking was not an "independent contractor" (because among other cited reasons it had no express, written contract), and even if there were, the "independent contractor" defense would not be available in this case. [See the Court's previous orders and Mountain's failure to meet the elements established in Shaffer v. Acme Limestone, Inc, 206 W. Va. 333 (1999)]. As a result as a

matter of law, Defendant Mountain is clearly liable for compensatory damages under the well-established legal principles of *respondeat superior*.

Having established that Defendant Mountain was vicariously liable for compensatory damages, prior to the beginning of the trial, the question of Defendant Mountain's direct liability for compensatory damages was never presented to the jury. That being the case, the Court can make no finding in regard to whether or not Mountain would have been directly liable for compensatory damages. However, as the jury found Mountain directly liable for punitive damages (on two (2) separate bases of its own acts or omissions and on its implicit or explicit ratification of the acts or omissions of its employees, agents, or servants), it seems almost certain that the jury could have likewise concluded from the evidence that Mountain was directly liable for some part of the compensatory damages.

Again, the Court does not believe that this presents grounds sufficient to grant a new trial.

6. That the Court erred in not allowing the testimony of Robert K. Tinnney in regard to the interpretation of the contract between Mountain and the State of West Virginia.

Defendant Mountain contends that the Court should have allowed the testimony of Robert K. Tinney, to the jury, regarding the interpretation of its contract with the State of West Virginia. The Court would first point out that the determination of whether a contract should be interpreted other than by its clear and unambiguous language is the province of the Court, and not the jury, as is the establishment of what the party's legal duty may be. Within this context, our Supreme Court has clearly and consistently ruled as such, as noted by the three (3) syllabus points in Toppings v. Rainbow Homes, Inc., 200 W. Va. 728, which are set out as follows:

> 1. It is the province of **the Court,** and **not the jury,** to interpret a written contract. Syl. Pt. 1, Stephens v. Barlett, 118 W. Va. 421, 191 S. E. 550 (1937). Syllabus Point 1, Orteza v. Monongalia County General Hospital, 173 W. Va. 461, 318 S. E. 2d 40 (1984).
>
> 2. A valid written instrument which expresses the intent of the parties **in plain and unambiguous language is not subject** to judicial construction or interpretation but will be applied and enforced according to such intent. Syllabus Point 1, Cotiga Development Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S. E. 2d 626 (1962).
>
> 3. A written contract merges all negotiations and representations which occurred before its execution, and in the absence of fraud, mistake, or material misrepresentations **extrinsic evidence cannot be used** to alter or interpret language in a written contract which is otherwise plain and unambiguous on its face. Syl. Pt. 3, Iafolla v. Douglas Pocohontas Coal Corporation, 162 W. Va. 489, 250 S. E. 2d 128 (1978). Syllabus Point 1, Warner v. Haught, Inc., 174 W. Va. 722, 329 S. E. 2d 88 (1985). (Emphasis supplied by the Court)

This being the case, any such testimony being plainly extrinsic evidence to the jury regarding the interpretation of the contract beyond its plain and unambiguous terms as determined by the Court would manifestly be improper.

Furthermore, the Court concluded previously and discussed in its Order entered October 26, 2000, that the contract with the State of West Virginia's DOT/DOH was, in fact and as a matter of law, plain and unambiguous in both its terms and in its effect, thereby imposing on Defendant Mountain a non-delegable duty to protect the public safety during all aspects of the paving project. As the written

contract was plain and unambiguous, any extrinsic evidence to the court, regarding the intent of the parties during their negotiations and representations beyond that, would also be improper and unnecessary, in that there was never a showing of fraud, mistake or material misrepresentation by either of the parties against the other.

Finally, this question was made moot when it became clear during the trial, given the Court's rationale noted above, that Defendant Mountain's relationship with Defendant Galloway Trucking, and its truck drivers, was not that of an "independent contractor" and was much more like an employer-employee relationship. This being the case, Defendant Mountain clearly had multiple legal duties to protect the public during all of the aspects of the DOT/DOH contract-based process.

As a result, the Court does not believe that this presents grounds sufficient to grant a new trial, in that the Court made the necessary and appropriate determinations of law, the jury made the appropriate determinations of fact, all of which established a fair and impartial verdict in this matter.

7. That the Court erred in finding that the 1994 contract between Mountain and Galloway, was not in effect at the time of the accident.

Defendant Mountain Enterprises contends that the contract established in 1994 between it and Defendant Galloway Trucking was still in effect on the date of the accident. In reviewing the evidence adduced at trial, the Court can find no evidence whatsoever to support this assertion, other than the assertion itself. To the contrary, all of the evidence adduced by testimony and exhibits supports the legal conclusion that there was no express, written contract that existed between Defendant Mountain and Defendant Galloway Trucking (see Court's previous Order). The prior conduct of the parties in no way suggests that the 1994 contract was one that would continue by operation of

the contract or by law until dissolved by one party or the other. Had this been the case, it may very well have not been an enforceable contract anyway, as being in violation of the applicable provisions of West Virginia's "Statute of Frauds" [see West Virginia Code §55-1-1, as well as Syllabus Point 1 of Fry Racing Enterprises, Inc. v. Chapman, 201 W. Va. 391 (1997)]. Regardless, in the Court's review and consideration of the evidence submitted both by Defendant Mountain Enterprises and by Defendant Galloway Trucking, the Court cannot but conclude that there was no express, written contract in effect.

Given the analysis set forth above, the Court does not believe that this presents grounds sufficient to grant a new trial.

8. That the Court erred in not permitting Department of Highways official Cam Lewis to testify to the jury regarding the legal weight limit of the truck driven by Kirk.

Defendant Mountain contends that Cam Lewis, an official of the Department of Highways involved in weight enforcement, should have been allowed to testify before the jury regarding what the legal weight limit was for the truck driven by Defendant Kirk. This simply would not have been proper for at least two (2) reasons. First, and foremost, the applicable weight limit is a question of law not of fact, and therefore should not be within the jury's consideration. Furthermore, the weight limit is established by statute, and thus by the legislature and is subject to interpretation only by the Courts, not the Department of Highways.

Officials from the Department of Highways may have specialized knowledge that would aid the Court in interpreting the law in the practical or routine enforcement sense. This was allowed by the Court, and the jury properly instructed as to the Court's legal determinations thereafter. These legal determinations, in fact, incorporated the evidence

adduced during the offer of proof given *in camera* to the Court. The irony, however, was that even by the additional evidence adduced from the DOH Officer, Cam Lewis, which caused the Court to amend its previous determinations, the Defendant Galloway Trucking's vehicle, as loaded by Defendant Mountain Enterprises, and as driven by Defendant Kirk, was nevertheless being operated legally "over-weight".

As noted above, however, such information presented for that purpose is not properly submitted to a jury. The Court was not persuaded that Mr. Lewis' interpretation of the law for enforcement purposes was completely accurate, and as Mr. Lewis is not in any sense a law-maker but rather a law-enforcer [see Kenneth Culp Davis' Administrative Law Treatise (1958), or Davis' Discretionary Justice (1972)], the Court is not bound by his interpretation. As is clear academically, and as is clear in the *real politic,* Mr. Lewis' use of discretion in the enforcement of the legal weight limits is determined both by his own personal standard (i.e. "Would you have issued a citation under these facts and circumstances?"), together with standards set by others irrespective of the statute (i. e. those set by executive order of the Governor). It was very instructive for the Court to note, however, that historically the Governor (former Governor Arch Moore) was not hesitant to issue directives with different standards than those imposed by the Legislature, and for him to require enforcement of his guidelines by the Executive branch and not those, again, set by the Legislature. In light of this information, it is thus the duty of this Court to review the law created by the legislature and interpret that law to the best of its ability, regardless of whether or not other government officials agree.

In view of all of the above, the Court does not believe that this presents grounds sufficient to grant a new trial.

9. That the Court erred in allowing the testimony of Plaintiff's expert Dr. Pesuit on reconstruction of the accident.

Defendant Mountain contends that Dr. Pesuit's testimony was irrelevant, as the cause of the accident was not disputed; or in the alternative, that even if relevant, the testimony and accompanying reconstruction video, were more prejudicial than probative, under the parameters established by WVRE Rule 403. In review of that issue, the Court whole-heartedly rejects the argument that the testimony of Dr. Pesuit is irrelevant.

Clearly, even if the end result of the accident is undisputed and stipulated, the jury must have evidence relevant to assist it in determining the proximate cause(s) and the varying degrees of liability for how the end result came to be. This information would have to be transmitted to the jury in some fashion, and Dr. Pesuit's testimony and exhibits were an effective way to do that.

The only legitimate question the Court can see is whether or not such testimony and Dr. Pesuit's accompanying video reconstruction were more prejudicial than probative, or vice versa, given the standards set forth in WVRE Rule 403 and its related cases. In that respect, the Court during the pre-trial process analyzed the proffered testimony and the related video tape demonstrating the accident. The Court carefully considered this issue prior to trial, as the video prepared by Dr. Pesuit was clearly a powerful presentation of the facts. Following the Court review, the Court concluded at that time that the video was prejudicial, in that it would be difficult to view that video and not perceive some of the horror the victims of the accident must have felt.

In the real sense, however, this was not a standard trial on the preliminary issue of liability, followed by damages, where the jury could be persuaded to find that a Defendant was liable on the basis of how horrible the accident was. But

rather, this was much more a trial on the issue of damages, and as such, which Defendant should, to what degree if at all, be held responsible for what had resulted from their respective acts or omissions. The mechanics of the accident were of the utmost importance, i. e. what happened first, why, and who was responsible; what happened next, why and who was responsible; etc.

Certainly the video, and Dr. Pesuit's testimony, made clear for the jury exactly how the accident occurred, in its component parts, and why it occurred in its respective stages, as no other manner of evidence could have. In that respect, the Court balanced the beneficial use and probative value of that evidence against: (1) the danger of unfair prejudice; (2) confusion of the issues; (3) misleading the jury; or (4) considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Consequently, the Court in its duty to balance the respective interests involved and weigh the probative value of the evidence concluded, then, that the video was more probative than prejudicial, and without reservation continues to stand by that conclusion [see State v. Derr, 192 W. Va. 165, (1994)].

On this point, then as with the others previously cited, the Court does not believe that this presents grounds sufficient to grant a new trial.

10. That the Court erred in allowing the testimony of Dr. Charles Benedict, as he was not qualified to testify as an expert regarding the subject of his testimony.

Defendant Mountain contends that the Court erred in qualifying Dr. Charles Benedict as an expert and thus allowing him to testify as one. The Court carefully reviewed Dr. Benedict's qualifications in light of the standards set forth in Rule 702 of the West Virginia Rules of Evidence, and concluded that he was indeed a qualified expert. The Court's determination in that respect has only been further supported by our Supreme Court's recent decision in Watson

v. INCO Alloy's Int'l, Inc., 209 W. Va. 234(2001), wherein our Supreme Court specifically held that such evidence as that adduced from Dr. Benedict may properly be considered "...technical or other specialized knowledge ... (which) ... will assist the trier of fact to understand the evidence or to determine a fact in issue...", and thus, may be properly adduced before the jury. Defendant Mountain has provided no evidence to show that Mr. Benedict's purported qualifications were false, or that would otherwise contradict the Court's finding that he was a qualified expert, in accordance with WVRE Rule 702 and Watson *op cit.*

As a result of the discussion set forth above, the Court does not believe that this presents grounds sufficient to grant a new trial.

11. That the Court erred in allowing the rebuttal testimony of Jason Price, an EMT at the scene of the accident.

Defendant Mountain contends that Mr. Price's rebuttal testimony was improper on the basis that it was not proper rebuttal to the Defendants' cases, and that Mr. Price was not an expert and should have been in regard to the subject of his testimony. First, the Court believes that there were factual questions raised in the Defendants' respective cases in regard to whether or not the occupants of the victim's car all died instantly from the initial impact of the Defendants' truck or not, which Mr. Price could properly be called to rebut. Specifically, the bulk of Mr. Price's testimony went to the positions of the bodies in the car, coming as a result of the impact of the Defendant Kirk's operation of the Defendant Galloway's truck. The Court believes that Defendants disputed this issue in their cases, and that Mr. Price's testimony could properly be used to rebut it.

Second, as noted, Mr. Price's testimony was in regard to the position of the bodies when he arrived at the accident. While the Court believes that, in accordance with Watson, *op cit,* EMT Price could under appropriate circumstances be

considered as an "expert witness" due to his technical or specialized knowledge, Price was primarily testifying here in regard to facts as to the physical condition of the victim's car and the relative positions of the bodies. Given the testimony and exhibits from all of the parties' witnesses on this issue, the jury drew whatever inferences that can be drawn from all such testimony and evidence as to whether any of the victims could have survived the initial impact.

Finally, Defendant Mountain contends that the testimony was prejudicial as a result of Mr. Price using the actual vehicle of the victims to illustrate his testimony. The Court rejects this argument for two reasons. First, the Court in regard to its original ruling *in limine* that the victim's car could not be used, as it was more prejudicial than probative on certain issues, warned the Defendants that should any Defendant open the door by making issues requiring the use of the victim's car to respond to such, the Court would not hesitate to modify its original ruling. Subsequently, Defendant Mountain counsel raised the issue. Second, the Court upon entertaining the Defendant's objection to such testimony and the use of the victim's car determined that the testimony, and the use of the vehicle as demonstrative evidence, was more probative than prejudicial, as required by WVRE Rule 403 and Derr, *op cit.*

Again, taking all of the above into consideration, the Court does not believe that this presents grounds sufficient to grant a new trial.

12. <u>That using the victim's vehicle as demonstrative evidence was more prejudicial than probative.</u>

Defendant Mountain contends that using the actual vehicle of the victims to illustrate his testimony was more prejudicial than probative. The Court rejects this argument, finding that the use of the vehicle as "demonstrative" evidence was more probative than prejudicial. The victim's vehicle, itself, is clearly relevant evidence, but its use was not

for use as "real" evidence itself. The distinction lies in the use of "real" evidence versus "demonstrative" evidence, in that demonstrative evidence's primary function is to assist the jury in understanding the testimony of the witness. When it was used for demonstrative purposes, the victims' vehicle was used by the witness to assist him in describing the respective positions of the bodies in the accident, as the Court's WVRE Rule 403 analysis on the record by the Court should demonstrate. Its limitations, according to Justice Cleckley's Handbook (see Handbook on Evidence, 592), are: (1) that the evidence must be relevant; and, (2) its use must actually be explanatory. In this case, its demonstrative use was supported by its relevance, together with the determination that the witness could not adequately describe for the jury's purposes the material facts and circumstances of such by the use of photographs, or other evidence, short of using the automobile itself.

Lastly, the Court rejects Defendant Mountain's contention that the prejudice was acerbated by the fact that this was the last piece of evidence seen by the jury. In response, the Court notes that the testimony of the last witness was the last heard by the jury, not the victim's car. Nevertheless, if evidence is proper, the Court has a duty to allow it in; correspondingly, if the evidence is not proper, the Court has a duty to keep the evidence out. The Court did not direct counsel to introduce evidence in any particular order, but rather the Court generally allowed each party to act as it determined fit and proper regarding the mode and order of the witnesses' interrogation and presentation, within the parameters set by WVRE Rule 611. As noted on the record, the Court gave the Defendant's the opportunity for sur-rebuttal if it believed it was necessary or proper.

In light of all of the above, the Court does not believe that this presents grounds sufficient to grant a new trial.

13. That the jury's compensatory damages verdict was against the clear weight of the evidence.

This case involved the deaths of two children, with no allegations of fault **whatsoever** on their part, or their mother, who was driving their vehicle. It seems ludicrous to the Court to claim that the award of compensatory damages for those deaths was against the clear weight of the evidence. The jury was given the unenviable task of answering the question of how much a child's life is worth. Had the amount returned been truly astronomical, it would be difficult to argue that the child's life was not worth that sum, however inappropriate such an award might be. In the case at hand, the jury returned a verdict consonant with the testimony of the financial experts in the trial, and one which the Court believes to be very clearly supported by the evidence, as well as appropriate in this case.

Although not on the issue of compensatory damages, the jury's treatment of the punitive damages issue is illustrative of how they worked through the other damages issues. Given the factors to be applied from the Garnes standard, the jury could have awarded five (5) times the compensatory damages, and the Court would have believed that, given all of the facts and circumstances of this case, it was reasonable. Nevertheless, the jury did not. As with the punitive damages, this jury considered the facts in evidence, regardless of which party adduced them, and the Court's charge regarding the issues of compensatory damages and reasonably found a verdict. In that respect, it is not the duty of the Court to use the Defendants' poor grounds to set that aside now, and award a new trial. From the Court review and consideration of the issues related to the compensatory damages awarded, there clearly was no "... prejudicial error that crept into the record or that substantial justice has not been done ..." [see Morrison v. Sharma, 200 W. Va. 192 (1997), citing In Re State Public Building Asbestos Litigation, op cit].

Given all of the foregoing, then, the Court does not believe that this presents grounds sufficient to grant a new trial.

Defendant Galloway Trucking's Motion for New Trial

Defendant Jerry Galloway, has set forth six (6) points of error which he believes warrant the granting of a new trial, in accordance with WVRCP Rule 59. As with the above, each point of error will be discussed individually.

1. That the Court erred in allowing the testimony of Plaintiffs' experts, Charles Benedict, David Pesuit and Gary Huey in regard to an incorrect legal weight limit.

Defendant Galloway Trucking contends that it was prejudiced when Plaintiffs' experts relied upon an erroneous weight standard during their testimony, and in formulating their opinions. The court is of the opinion that, had the originally determined weight standard been allowed to stand, or left open for determination by the jury, then this position would be more credible. However, the legal weight limit is a matter of law and was, therefore, determined by the Court, and not the jury. During the testimony of Plaintiffs' experts, the Court believed, as apparently did other counsel, that the various weight limits utilized in formulating the experts' opinions and testimony were accurate according to statute.

It was not until nearly the end of the trial when Defendant Mountain Enterprises brought in an unlisted witness with information previously unknown to both the Court and presumably other counsel. This information was in regard to the methodology by which the statute is intended to operationally calculate the legal weight limit applicable to any certain highway in the State, including the subject highway, West Virginia State Route No. 10. At that time, following its consideration of the evidence the Court amended its previous ruling regarding the legal weight limit applicable. The Court subsequently informed the jury that,

despite any lay or expert testimony they may have heard to the contrary, the weight limit was set as a matter of law, and informed the jury just what that weight limit was.

Within this context, it appears to the Court that any prejudice Defendants may suffered as a result of Plaintiffs' experts testifying to an erroneous standard, is correspondingly offset by the prejudice Plaintiffs' suffered in regard to the diminishment of credibility of their expert witnesses when the Court changed its ruling regarding the applicable legal weight limit. Furthermore, had Defendants more diligently researched and prepared arguments on this matter, the issue may have been settled prior to the testimony of the Plaintiffs' or the Defendants' experts, which would have been the optimal solution for this kind of problem, given our Supreme Court's admonishments in Gentry v. Mangum, 195 W. Va. 512 (1995) of the timely use and reliance upon WVRE Rules 103 and 104, particularly in conjunction with Rules 702 and 703. As it was, however, the Court amended its previous determination, which was the basis of the jury's information, and contemporaneously gave curative instructions to the jury. Subsequently, the Court gave the appropriate instruction to the jury to use in their deliberations over the testimony and other evidence of expert witnesses, allowing them to give weight and credit to none, any or all such evidence adduced from the experts as the jury determined that they were entitled to receive (see Court Charge, expert witness provisions of instructions).

As a result of the discussion above, then, the Court does not believe that this presents grounds sufficient to grant a new trial.

2. That the Court erred in not permitting Department of Highways official Cam Lewis to testify to the jury regarding the legal weight limit of the truck driven by Kirk.

Defendant Galloway, as did Defendant Mountain Enterprises, contends that Cam Lewis, a weight limit enforcement officer of the Department of Highways, should have been allowed to testify to the jury regarding what the applicable legal weight limit was for the truck driven by Defendant Kirk for Defendant Galloway Trucking. This simply would not have been proper for at least two (2) reasons. First, and foremost, the applicable weight limit is a question of law not of fact, and therefore should not be within the jury's consideration. Furthermore, the weight limit is established by statute, and thus by the legislature and is subject to interpretation only by the Courts, not the Department of Highways.

Officials from the Department of Highways may have specialized knowledge that would aid the Court in interpreting the law in the practical or routine enforcement sense. This was allowed by the Court, and the jury properly instructed as to the Court's legal determinations thereafter. These legal determinations, in fact, incorporated the evidence adduced during the offer of proof given *in camera* to the Court. The irony, however, was that even by the additional evidence adduced from the DOH Officer, Cam Lewis, which caused the Court to amend its previous determinations, the Defendant Galloway Trucking's vehicle, as loaded by Defendant Mountain Enterprises, and as driven by Defendant Kirk, was nevertheless being operated legally "over-weight".

As noted above, however, such information presented for that purpose is not properly submitted to a jury. The Court was not persuaded that Mr. Lewis' interpretation of the law for enforcement purposes was completely accurate, and as Mr. Lewis is not in any sense a law-maker but rather a law-enforcer [see Kenneth Culp Davis' Administrative Law Treatise (1958), or Davis' Discretionary Justice (1972)), the Court is not bound by his interpretation. As is clear academically, and as is clear in the *real politic,* Mr. Lewis' use of discretion in the enforcement of the legal weight limits

is determined both by his own personal standard (i.e. "Would you have issued a citation under these facts and circumstances?"), together with standards set by others irrespective of the statute (i. e. those set by executive order of the Governor). It was very instructive for the Court to note, however, that historically the Governor (former Governor Arch Moore) was not hesitant to issue directives with different standards than those imposed by the Legislature, and for him to require enforcement of his guidelines by the Executive branch and not those, again, set by the Legislature. In light of this information, it is thus the duty of this Court to review the law created by the legislature and interpret that law to the best of its ability, regardless of whether or not other government officials agree.

In view of all of the above, the Court does not believe that this presents grounds sufficient to grant a new trial.

3. That Plaintiffs' use of photographs of the victims' graves as demonstrative evidence was inflammatory and unduly prejudicial sufficient to warrant a new trial.

Defendant Galloway contends that Plaintiffs' use of photographs of the graves of the victims as demonstrative evidence during closing, was unduly prejudicial. While the use of the pictures was not made during the evidence, reference to such was made by Plaintiff's counsel. However, during Plaintiffs' closing no objection was made to the use of these pictures. The Defendants then rely on the position that because these photographs were not disclosed prior to their use, Defendants were unfairly surprised and were reluctant to object during closing such that by the time the decision to object was made, it was no longer reasonable to object at that time.

The Court understands and appreciates a lawyer's respect for another lawyer's presentation, such that makes them reluctant to interrupt the presentation of another lawyer unless absolutely necessary. In that respect, the Court by no

means wishes to diminish that respect or damage that attitude. To the contrary, in this case the Court wishes to praise any restraint demonstrated by any counsel. In fact, the Court is of the opinion that given the circumstances, it would not have been improper to object at the conclusion of Plaintiffs' presentation, and if sustained by the Court, the Court could have attempted to devise a timely remedy. From the Court's recollection and cursory review of the record, there does not appear to have been any objection to such a use of demonstrative pictures.

Regardless, the generally established rule concerning closing arguments allows significant liberty by way of demonstrative evidence (see WVTCR Rule 23.04(b) and case authorities), and it certainly was not improper that Plaintiffs' counsel did not move the photographs into evidence, given their use for demonstrative purposes only. More importantly, however, the Court does not believe that the very brief and momentary use of the photographs of the graves as part of the visual presentation of demonstrative evidence created any undue prejudice, it having been tied to earlier evidence during the trial and given the parameters that have been historically established.

Given all of the above, the Court does not believe that this presents grounds sufficient to grant a new trial.

4. That all errors apparent on the face of the record warrant a new trial.

The Court does not believe that there are errors which are apparent on the face of the record, sufficient to warrant the grant of a new trial. If there are any errors, such errors are "harmless error" (see WVRCP 61 and cited case authorities thereunder). In that respect, no trial is conducted perfectly. Particularly, with a trial this lengthy; with this many parties; with the facts so tragic; with the hostility level high among the parties; and, with a verdict with such compensatory and punitive damages returned, the allegations of error that

occurred during the trial might be ten (10) times what they, in fact, have been.

Taking the entire record into account, however, the Court does not believe that this presents grounds sufficient to grant a new trial.

5. That the Court erred in not giving Counsel opportunity to object to the verdict form, prior to its submission to the jury.

The Court believes that the jury form which it submitted to the jury was proper. The Court's Charge, containing its instructions of law, and the Jury Verdict Form were formulated consistently with the same procedure the Court has used for each and all other cases. After receiving and reviewing all of the proposed verdict forms, the Court formulated the final draft of the verdict form. Counsel for all parties were given an equal opportunity to object to the jury verdict form, in accordance with the WVRCP 49 and WVTCR 23.02. The fact that Counsel did, or did not, object to the final verdict form prior to its submission to the jury is irrelevant. As counsel *was* expressly given an opportunity to object and to make whatever record counsel believed was appropriate for appeal purposes, the only question that could possibly present error in this regard is whether or not the jury's verdict form, itself, was proper. As stated above, after taking into consideration all of the proposed verdict forms, all of the evidence adduced at trial, all of the proposed instructions, and the final Court's Charge, containing its incorporated instructions of law, the Court believes that the Court's formulated jury verdict form was proper to submit to the jury for and during its use in its deliberations toward a verdict.

Given the standard that the trial Court has considerable discretion in formulating the verdict form, the Court does not believe that this presents grounds sufficient to grant a new trial [see Carper v. Kanawha Banking and Trust, 157 W.Va.

477 (1974), Carper v. Sundale Nursing Home, 193 W. Va. 475 (1995), and Lively v. Rufus, 207 W. Va. 436(2000)].

6. That the verdict form submitted to the jury was improper and allowed for a double recovery of punitive damages against Galloway.

Defendant Galloway further contends that the jury form the Court used allowed the jury to return a verdict that constituted a double recovery for the plaintiffs, and was thus improper. The Court explicitly disagrees with this contention, and maintains that the verdict form used was the most appropriate, in that it reflected the facts and circumstances at the trial. It was the jury's determination that Defendant Galloway Trucking should be penalized once for its acts or omissions, and once for how it either expressly or implicitly ratified the acts or omissions of Defendant Kirk. The propriety of the verdict form, as well as whether or not there has been a double recovery was discussed at length in the Court's Order (e.g. Garnes Order) regarding review of the punitive damages awarded. Reiterating the Court's reasoning here would serve no useful purpose. Suffice it to say that the Court believes that the verdict form was proper and that there was in fact, no double recovery against Defendant Galloway Trucking.

As a result, the Court does not believe that this presents grounds sufficient to grant a new trial.

DEFENDANT KIRK'S MOTION FOR A NEW TRIAL

Defendant, Billy Kirk has set forth nine points of error, which he believes warrant a new trial. Each point of error will be discussed individually.

1. That the Court erred in admitting for any purpose the blood test of Billy Kirk, in which Mr. Kirk tested positive for marijuana.

Defendant Kirk contends that there is no purpose for which the drug test could have been admitted, which would have had probative value, or at least where it would have been more probative than prejudicial. The Court expressly disagrees. The blood test was introduced to show that: first, Galloway did not fulfill the expectations of the contract Defendant Mountain argues that the two (2) parties had in effect; and second, that Defendant Mountain performed no safety checks of the trucks or drivers, nor ensured that Defendant Galloway Trucking performed any safety checks of the trucks or drivers, such as drug screening.

There was no evidence that Mr. Kirk was at all impaired at the time of the accident. There was no argument to that effect. Defendant Kirk's criminal conviction for "negligent homicide" was based upon the condition of the truck and its tires, and not based upon any use of marijuana. The Court believes that the jury is capable of separating out what it means to have smoked marijuana at some point in the past, and what would have meant to have smoked it just prior to driving, and the Court gave a curative, or limited instruction to that effect. The Court believes that for the purpose it was admitted, the drug test was more probative than prejudicial.

Thus, the Court does not believe that this presents grounds sufficient to grant a new trial.

2. That the Court erred in allowing the testimony of Plaintiffs' experts, Charles Benedict, David Pesuit and Gary Huey in regard to an incorrect legal weight limit.

Defendant Kirk, as did Defendant Galloway Trucking, contends that it was prejudiced when Plaintiffs' experts relied upon an erroneous weight standard during their testimony, and in formulating their opinions. The court is of the opinion that, had the originally determined weight standard been allowed to stand, or left open for determination by the jury, then this position would be more credible. However, the legal weight limit is a matter of law and was, therefore,

determined by the Court, and not the jury. During the testimony of Plaintiffs' experts, the Court believed, as apparently did other counsel, that the various weight limits utilized in formulating the experts' opinions and testimony were accurate according to statute.

It was not until nearly the end of the trial when Defendant Mountain Enterprises brought in an unlisted witness with information previously unknown to both the Court and presumably other counsel. This information was in regard to the methodology by which the statute is intended to operationally calculate the legal weight limit applicable to any certain highway in the State, including the subject highway, West Virginia State Route No. 10. At that time, following its consideration of the evidence the Court amended its previous ruling regarding the legal weight limit applicable. The Court subsequently informed the jury that, despite any lay or expert testimony they may have heard to the contrary, the weight limit was set as a matter of law, and informed the jury just what that weight limit was.

Within this context, it appears to the Court that any prejudice Defendants may have suffered as a result of Plaintiffs' experts testifying to an erroneous standard, is correspondingly offset by the prejudice Plaintiffs suffered in regard to the diminishment of credibility of their expert witnesses when the Court changed its ruling regarding the applicable legal weight limit. Furthermore, had Defendants more diligently researched and prepared arguments on this matter, the issue may have been settled prior to the testimony of the Plaintiffs' or the Defendants' experts, which would have been the optimal solution for this kind of problem, given our Supreme Court's admonishments in Gentry v. Mangum, 195 W. Va. 512 (1995) of the timely use and reliance upon WVRE Rules 103 and 104, particularly in conjunction with Rules 702 and 703. As it was, however, the Court amended its previous determination, which was the basis of the jury's information, and contemporaneously gave

curative instructions to the jury. Subsequently, the Court gave the appropriate instruction to the jury to use in their deliberations over the testimony and other evidence of expert witnesses, allowing them to give weight and credit to none, any or all such evidence adduced from the experts as the jury determined that they were entitled to receive (see Court Charge, using Supreme Court recommended expert witness instruction).

As a result of the discussion above, then, the Court does not believe that this presents grounds sufficient to grant a new trial.

3. That the Court erred in not permitting Department of Highways official Cam Lewis to testify to the jury regarding the legal weight limit of the truck driven by Kirk.

Defendant Kirk, as did the other Defendants, contends that Cam Lewis, an official of the Department of Highways should have been allowed to testify to the jury regarding what the legal weight limit was for the Defendant Galloway's truck driven by Defendant Kirk. This simply would not have been proper for at least two (2) reasons. First, and foremost, the applicable weight limit is a question of law not of fact, and therefore should not be within the jury's consideration. Furthermore, the weight limit is established by statute, and thus by the legislature and is subject to interpretation only by the Courts, not the Department of Highways. Officials from the Department of Highways may have specialized knowledge that would aid the Court in interpreting the law in the practical or routine enforcement sense. This was allowed by the Court, and the jury properly instructed as to the Court's legal determinations thereafter. These legal determinations, in fact, incorporated the evidence adduced during the offer of proof given *in camera* to the Court. The irony, however, was that even by the additional evidence adduced from the DOH Officer, Cam Lewis, which caused

the Court to amend its previous determinations, the Defendant Galloway Trucking's vehicle, as loaded by Defendant Mountain Enterprises, and as driven by Defendant Kirk, was nevertheless being operated legally "over-weight".

As noted above, however, such information presented for that purpose is not properly submitted to a jury. The Court was not persuaded that Mr. Lewis' interpretation of the law for enforcement purposes was completely accurate, and as Mr. Lewis is not in any sense a law-maker but rather a law-enforcer [see Kenneth Culp Davis' Administrative Law Treatise (1958), or Davis' Discretionary Justice (1972)], the Court is not bound by his interpretation. As is clear academically, and as is clear in the *real politic,* Mr. Lewis' use of discretion in the enforcement of the legal weight limits is determined both by his own personal standard (i.e. "Would you have issued a citation under these facts and circumstances?"), together with standards set by others irrespective of the statute (i. e. those set by executive order of the Governor). It was very instructive for the Court to note, however, that historically the Governor (former Governor Arch Moore) was not hesitant to issue directives with different standards than those imposed by the Legislature, and for him to require enforcement of his guidelines by the Executive branch and not those, again, set by the Legislature. In light of this information, it is thus the duty of this Court to review the law created by the legislature and interpret that law to the best of its ability, regardless of whether or not other government officials agree.

In view of all of the above, the Court does not believe that this presents grounds sufficient to grant a new trial.

4. That Plaintiffs use of photographs of the victims' graves as demonstrative evidence was inflammatory and unduly prejudicial sufficient to warrant a new trial.

Defendant Galloway contends that Plaintiffs' use of photographs of the graves of the victims as demonstrative

evidence during closing, was unduly prejudicial. While the use of the pictures were not made during the evidence, reference to such was made by Plaintiff's counsel. However, during Plaintiffs' closing no objection was made to the use of these pictures. The Defendants then rely on the position that because these photographs were not disclosed prior to their use, Defendants were unfairly surprised and were reluctant to object during closing such that by the time the decision to object was made, it was no longer reasonable to object at that time. The Court understands and appreciates a lawyer's respect for another lawyer's presentation, such that makes them reluctant to interrupt the presentation of another lawyer unless absolutely necessary. In that respect, the Court by no means wishes to diminish that respect or damage that attitude. To the contrary, in this case the Court wishes to praise any restraint demonstrated by any counsel. In fact, the Court is of the opinion that given the circumstances, it would not have been improper to object at the conclusion of Plaintiffs' presentation, and if sustained by the Court, the Court could have attempted to devise a timely remedy. From the Court's recollection and cursory review of the record, there does not appear to have been any objection to such a use of demonstrative pictures.

Regardless, the generally established rule concerning closing arguments allows significant liberty by way of demonstrative evidence (see WVTCR Rule 23.04(b) and case authorities), and it certainly was not improper that Plaintiffs' counsel did not move the photographs into evidence. More importantly, however, the Court does not believe that the very brief and momentary use of the photographs of the graves created any undue prejudice, given how they were tied to earlier evidence from the trial and the parameters for demonstrative evidence that have been historically established.

Given all of the above, the Court does not believe that this presents grounds sufficient to grant a new trial.

5. That the Court erred in not giving Counsel opportunity to object to the verdict form, prior to its submission to the jury.

The Court believes that the jury form which it submitted to the jury was proper. After receiving and reviewing all of the proposed verdict forms, the Court formulated the final draft of the verdict form. Counsel for all parties were given an equal opportunity to object to the jury verdict form, in accordance with the WVRCP 49 and WVTCR 23.02. The fact that Counsel did not object to the final verdict form prior to its submission is irrelevant. As counsel *was* expressly given an opportunity to object and to make whatever record counsel believed was appropriate, the only question that could possibly present error in this regard is whether or not the verdict form itself was proper. As stated above, after taking into consideration all of the proposed verdict forms, all of the evidence adduced at trial, all of the proposed instructions, and the final Court's Charge, the Court believes that the Court's formulated verdict form was proper to submit to the jury for and during its deliberations.

Given the standard that the trial Court has considerable discretion in formulating the verdict form, the Court does not believe that this presents grounds sufficient to grant a new trial [see Carper v. Kanawha Banking and Trust, 157 W.Va. 477 1974), Carper v. Sundale Nursing Home, 193 W. Va. 475 (1995), Lively v. Rufus, 207 W. Va. 436(2000)].

6. That the verdict form submitted to the jury was improper and allowed for a double recovery of punitive damages against Galloway and Mountain, thereby making it more likely that punitive damages would be awarded against Kirk.

Defendant Kirk contends that the jury form the Court used allowed the jury to return a verdict that constituted a double recovery for the plaintiffs and was such as to make it more likely that an award of punitive damages would be

returned as to all parties. The Court disagrees with this contention, and maintains that the verdict form used was the most appropriate, given the facts and circumstances of the trial. The propriety of the verdict form, as well as whether or not there has been a double recovery, or the increased likelihood of any punitive damages, was discussed at length in the Court's Order regarding review of the punitive damages awarded. Reiterating the Court's reasoning here would serve no more useful purpose. Suffice it to say that the Court believes that the verdict form was proper and that there was in fact, no double recovery.

As a result, the Court does not believe that this presents grounds sufficient to grant a new trial.

7. That the Court erred in weighing the evidence as to Billy Kirk in its application of the Garnes Factors, and that the Judgment should be set aside.

Defendant Kirk contends that the Court did not properly weigh the evidence regarding Billy Kirk in its application of the Garnes factors. Of all of the Defendants, Defendant Kirk has not only testified contrary to this argument, as the Court has noted earlier, but pled guilty to the criminal offense of "negligent homicide," which in and of itself lays the foundation for the assessment of punitive damages.

Given the amounts assessed, however, the Court cannot but determine that the jury, in fact, gave great credit and weight to the evidence of Defendant Kirk. The Court very carefully considered the evidence presented in this trial in light of the factors set out in Garnes. After doing so, the Court is of the opinion that the jury carefully considered all of the appropriate factors in making its award against Kirk. Certainly, the award is fractional in comparison to the awards against Defendant Mountain Enterprises, or even Defendant Galloway Trucking. But, just as evident is the fact that the award is as devastating to Kirk, as the award against Galloway Trucking is to it, and probably more devastating

than the award against Defendant Mountain. The Court believes that the jury's verdict was supported by the evidence, and the Court properly reviewed it, as set out in the Court's Order regarding the review of punitive damages.

Following its review, then, the Court does not believe that this presents grounds sufficient to set aside the judgment.

8. That the Court erred in not setting aside the Judgment against Kirk in light of Mountain's violation of the Court's motion *in limine* ruling, subsequent misuse of the evidence regarding Kirk's drug test.

While the Court agrees that, given the actions of the Defendant Mountain in expressly violating the Court's ruling on Defendant Kirk's Motion *in limine,* as the comprehensive analysis set out hereinbefore illustrates, the Court is of the opinion that a sanction should be imposed upon the Defendant Mountain, but that a new trial would only reward Defendant Mountain for its improper conduct. In regard to the potential prejudice done to Defendant Kirk due to Mountain's violation, earlier in the trial the Court had given an appropriate instruction that should have restricted the consideration of such evidence by the jury. Thus, it was not the mere mention by Mountain Enterprises of the facts so restricted but how those facts were misconstrued and used to argue against the Court's expressly given curative instruction during the evidentiary portion of the trial.

Given the Court's determination of the need for further consideration of the applicability and appropriateness of sanctions, the Court has determined that it is just and necessary for the Court to hold a separate hearing on the issue of sanctions, apart from the Court's order on the procedural issues presented at this juncture.

That all errors apparent on the face of the record warrant a new trial.

As the Court has noted previously herein, the Court does not believe that there are errors which are apparent on the face of the record, sufficient to warrant the grant of a new trial, nor do any such allegations support any judgment as a matter of law.

In consideration of which, the Court does not believe that this presents grounds sufficient to grant a new trial.

C. Respective Motions for Sanctions

Defendant Kirk's Motion for Sanctions Against Mountain

This issue and the relief requested was addressed above. To briefly reiterate, the Court is of the opinion that sanctions may be proper to remedy the conduct suffered by Defendant Kirk, but the propriety of that sanction should be the topic of a separate proceeding.

Finally, within that same context, this Order should not be held up while the Court continues to ponder the alternatives, because in doing so further damage may be suffered by the respective parties resulting from unreasonable delay or confusion of the primary issues in the adjudication of this case.

Plaintiffs' Motions for Sanctions Against Mountain

In review of the respective motions of the Plaintiffs, the Court would apply the same rationale to its motions as it would to the Defendant's motion.

Conclusion

As the Court noted in its introduction to this discussion, the tragic facts that underlie the legal points in dispute; the preventability of that tragedy; and, the constant conflict among the parties, all contributed to make this case difficult to litigate. Irrespective of these difficulties, however, the

Court believes that the jury heard and considered properly the evidence, weighing and giving credit to the evidence adduced from the respective parties' witnesses, both lay and expert. The jury then applied the law properly from the Court's Charge, which contained the appropriate instructions of law within the format prescribed by our Supreme Court in its standard charge. After listening to the respective closing arguments of counsel, in which the Defendants alternatively blamed one another, the jury retired to deliberate toward a verdict. After several hours, it returned its verdict for both compensatory and punitive damages against all of the parties, in accordance with the evidence and the law. In that, the Court is firmly of the opinion that there was no error.

If the Supreme Court, upon its review, should determine that there was some error, it should merely be considered "harmless error". The doctrine of harmless error is firmly established historically by statute (see West Virginia Code §58-1-2 and 3), as well as by administrative rule (see WVRCP Rules 1 and 61) and by case authority [see State Road Commission v. Bowling, 152 W. Va.- 688 (1969); also Ilosky v. Michelin Tire Corp, 172 W. Va. 435 (1983)]. As has been stated by our Supreme Court, the trial court's conduct of the trial does not have to be "perfect" in order to be affirmed. In that respect, this case and its conduct by all of the parties, including the Court, was anything but perfect. As counsel for Defendant Galloway Trucking pointed out to the jury in its closing argument (paraphrasing):

> ...When there's no water in the trough for the horses to drink, sooner or later the horses will start to bite one another.

And bite one another they did, for the primary defense offered by each Defendant in this case seemed at the time to be "I was wrong, but the other Defendants were more wrong than I was." Moreover, upon the Court's review of the record that has been generated, that perception has only been

reinforced; and, in considering the potential remedy of a new trial, our Supreme Court has further held that a trial court **rarely** grants a new trial, and a new trial should **only** be granted where it is reasonably clear that prejudicial error has crept into the record, or that substantial justice has not been done [see Morrison v. Sharma, 200 W. Va. 192 (1997)].

In this case, it cannot be said that prejudicial error has crept into the record, or that substantial justice has not been done. As a result, the Court should, and hereby does, DENY each and all WVRCP Rule 50 and 59 Motions for New Trial, or in the alternative, Motions for Judgment as a Matter of Law.

Findings and Conclusions

UPON MATURE CONSIDERATION OF ALL OF THE ABOVE, including the original pleadings by the respective parties, the matters litigated in the discovery process, the Court's previous orders, the jury trial conducted and the jury's verdict returned in this matter, the Garnes proceeding and Court order, in light of the post-trial motions and the entire record in this case, the Court does hereby make the following findings of fact and conclusions of law:

(1) That after review and consideration of all of the above, this Court has statutory and Rule-based jurisdiction and venue over the subject matter and the parties, in accordance with all of the authorities cited hereinbefore; and,

(2) That following the Court's entry of its Trial Order and Final Judgment Order of January 31, 2002, following the recent determinations on the Garnes issues from its Order entered December 21, 2001, the respective Defendants have filed and argued their WVRCP Rule 59 Motions for New Trial, and in the alternative, WVRCP Rule 50 Motions for Judgment as a Matter of Law, all as set forth herein; and,

(3) That in reviewing and considering the issues raised by the respective Defendants, the Court has analyzed the arguments, citing thereat the applicable points and authorities, *in seriatim,* in the "Discussion..." section set out above; correspondingly, the Court hereby expressly approves, adopts and incorporates each and all of the points and authorities cited, as if they were separately set out herein; and,

(4) That after citing and applying the applicable Rule-based standard of review, as supported by its points and authorities, the Court has determined as a matter of the factual record there is no basis for the granting of a new trial; correspondingly, it is just and reasonable for the Court to conclude as a matter of law that there is no basis for the granting of a new trial for any party, or in the alternative, for the granting of judgment as a matter of law for any party; and,

(5) That as a result of all of the above, the Court hereby finds and concludes that it is reasonable and necessary to DENY each and all of the said Motions by the Defendants in this matter, with their respective objections and exceptions to the Court's rulings herein noted for the record; and,

(6) That upon the other Defendant and Plaintiff Motions for Sanctions herein referenced, the Court has determined that such sanctions are more appropriately addressed in a separate and distinct proceeding; as a result of which, the Defendant Kirk and the Plaintiffs are hereby directed to submit proposed sanctions within the following contexts:

(A) WVRCP Rule 37 for Discovery Sanctions;

(B) WVTCR Rule 17.08 for Disqualification Sanctions;

(C) WVTCR Rule 25.10 for Mediation Sanctions; and,

(D) Applicable authorities for violations of *in limine* rulings, improper mistrial motions, improper WVRCP Rule 68 revocations of offers of judgment, and WVTCR Rule 4.09 violations.

(7) That given the novel approach here directed by the Court, the respective parties shall make simultaneous submissions to the Court within the next thirty (30) days; and,

(8) That as a result of all of the Court's determinations made hereinbefore, particularly the DENIAL of all of the relief requested for new trials, or in the alternative, judgments as a matter of law, the Court hereby expressly ADOPTS AND AFFIRMS the previously accepted jury verdict, confirmed by the Court in its Trial Order and Final Judgment Order previously entered by this Court on or about January 31, 2002, with the express understanding based upon that of the respective parties, that post-judgment interest began to accrue as of August 16, 2001, and that the costs of this proceeding shall be taxes to the Defendants, in that the Plaintiff has substantially prevailed, in accordance with the applicable provisions of WVRCP Rules 54 and 58.

All of which is hereby ADJUDGED, ORDERED and DECREED.

It is further hereby ADJUDGED, ORDERED AND DECREED that the Clerk of this Court is hereby directed to provide notice of the entry of this Order by forwarding certified copies of the same to the respective parties herein, through counsel as appropriate, by USPS First Class Mail, by hand delivery or by facsimile transmission, all in accordance with the applicable provisions of Rules 10.01-12.06 of the West Virginia Trial Court Rules, as follows:

H. Truman Chafin, at P. O. Box 1739, Williamson, West Virginia, 25661; Robert P. Martin, at P. O. Box 2151, Charleston, West Virginia, 25328; John Hoblitzel, at Kay,

Casto & Chaney, P. O. Box 2031, Charleston, West Virginia, 25327; Mary Sanders, Huddleston, Bolen, Beatty, Porter & Copen, P. O. Box 3786, Charleston, WV 25330; and Al Emch, Jackson and Kelly, P. O. Box 553, Charleston, West Virginia 25322.

Entered this 19th day of October, 2002 A. D.

APPENDIX G

[DECISION DENYING PETITION FOR APPEAL] [UNPUBLISHED]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 29th of October, 2003, the following order was made and entered:

Daniel R. Fitch, and Adam Plumley, co-Administrators of the Estates of Harley Fitch and Tyler Fitch, deceased, and Daniel R. Fitch, individually, Plaintiffs Below, Respondents

vs.) No. 031470

Mountain Enterprises, Inc., d/b/a Lenore Asphalt, Inc., a Kentucky corporation, Jerry Galloway, individually, and d/b/a Galloway's Trucking, and Billy D. Kirk, Defendants Below,

Mountain Enterprises, Inc. Petitioner

On a former day, to-wit, July 14, 2003, came the petitioner, Mountain Enterprises, Inc., by A.L. Emch and Gretchen M. Callas, Jackson Kelly, its attorney, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Lincoln County, rendered on the 21st day of October, 2003, with the record accompanying the petition. Thereafter, on the 24th day of July, 2003, came the respondents, Daniel R. Fitch and Gregory Adam Plumley, by H. Truman Chafin and Letitia Neese Chafin, The H. Truman Chafin Law Firm, their

attorney, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: /s/_____
Clerk, Supreme Court of Appeals

APPENDIX H

[WEST VIRGINIA SUPREME COURT OF APPEALS' ORDER DENYING RECONSIDERATION]

[UNPUBLISHED]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of January, 2004, the following order was made and entered:

Daniel R. Fitch and Adam Plumley,
co-administrators of the Estates of Harley
Fitch and Tyler Fitch, deceased, and
Daniel Fitch, individually, Plaintiffs
Below, Respondents

vs.) No. 031470

Mountain Enterprises, Inc., dlb/a Lenore
Asphalt, Inc., a Kentucky corporation,
Jerry Galloway, individually and d/b/a
Galloway's Trucking, and Billy D. Kirk,
Defendants Below,

Mountain Enterprises, Inc., Petitioner

On a former day, to-wit, November 26, 2003, came the petitioner, Mountain Enterprises, Inc., by A. L. Emch, Jackson Kelly PLLC, its attorney, and presented to the Court its motion in writing for reconsideration of its petition for appeal refused by order of this Court entered on the 29th day of October, 2003.

Thereafter, on the 19th day of December, 2003, came the respondents, Daniel R. Fitch, et al., by H. Truman Chafin and

Letitia A. Chafin, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion for reconsideration.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

APPENDIX I

[TRIAL COURT TRIAL ORDER AND FINAL JUDGMENT ORDER]

[UNPUBLISHED]

IN THE CIRCUIT COURT
OF LINCOLN COUNTY,
WEST VIRGINIA:

DANIEL R. FITCH, and ADAM PLUMLEY,
Co-Administrators of the Estates of Harley Fitch
and Tyler Fitch, deceased and DANIEL R. FITCH,
individually,

Plaintiffs,

v. CIVIL ACTION NO. 99-C-86

MOUNTAIN ENTERPRISES, INC., d/b/a
Lenore Asphalt, Inc., a Kentucky corporation,
JERRY GALLOWAY, individually and d/b/a
Galloway's Trucking, and BILLY D. KIRK,

Defendants.

TRIAL ORDER AND FINAL JUDGMENT ORDER

On the 21st day of May, 2001 this matter came before the Court for the Court to rule on various pending motions previously argued, and now ripe for decision preparatory for the beginning of the trial of this case. Various motions were granted, and various motions were denied. Among the motions that were granted, was a motion to bifurcate the trial among the plaintiffs, such that William Poindexter as administer of the estate of Leigh Ann Poindexter would have his case heard separately from that of Daniel Fitch and Adam

Plumbley, co-administrators of the estates of Tyler and Harley Fitch.

On the 22nd day of May, various motions and preliminary matters were entertained by the Court, and the parties then proceeded with jury selection for the case of William Poindexter. The Court granted requests for individual voir dire in respect to several jurors. On May 23rd, the Court was prepared to proceed with opening statements, at which time the Court was informed that the parties had again entered into settlement negotiations and that it was believed that a settlement was imminent. The parties then announced to the Court that they had, in fact, reached a settlement of the case.

Whereupon, there was lengthy discussion as to how to proceed with the case of Daniel Fitch and Adam Plumbley. While neither Truman Chafin nor Letitia Neese, counsel for Daniel Fitch and Adam Plumbley, took part in the selection of the jury, Ms. Neese was present during jury selection. After full discussion of the matter among the parties, including Truman Chafin and Letitia Neese, all parties agreed to go ahead with the trial of the case of Daniel Fitch and Adam Plumbley, with the jury that had already been selected.

On the 29th day of May, the Court reconvened to hear a motion for mistrial from Mountain Enterprises, Inc., based upon an improper comment Judge Hoke was alleged to have made in the presence of the jury. Mountain Enterprises, Inc., called Peter Broadbent, III to the stand in support of its motion. After the testimony of Mr. Broadbent the Court enquired of each juror individually as to the comment. No juror recalled any comment of the nature alleged. Mountain Enterprises, Inc., withdrew it motion, at which time, Plaintiffs made a motion for a mistrial and a new jury. The Court refused to call a mistrial as a result of any prejudice plaintiffs may have suffered, and ordered parties to be prepared to proceed with the trial on May 31st.

On may 30th, the Court heard and ruled upon various motions not previously ruled upon as part of the Poindexter side of this case. On May 31st, the parties made opening statements and Plaintiffs first witness, Trooper Danny Chapman was called to the stand. At the conclusion of Trooper Chapman's testimony, Plaintiffs called Mona Dale Koontz. Following the direct examination of Ms. Koontz, the Court adjourned for the day.

On June 4th, the testimony of Ms. Koontz was concluded, and David R. Pesuit was called to the stand. Following Mr. Pesuit, Plaintiffs called Gary Huey. On June 5th, Plaintiffs called Charles Daniel Herman as an adverse witness. Following Mr. Herman's testimony, Plaintiff Daniel R. Fitch was called to the stand. On June 6th, the testimony of Daniel Fitch was concluded and plaintiffs called Dr. Charles Benedick. Following Dr. Benedick, Plaintiff Gregory Adam Plumbley was called to the stand. On June 7th, Plaintiffs called Dr. William Cobb followed by Dr. Daniel Selby. At the conclusion of Dr. Selby's testimony, the Plaintiffs rested.

At the close of the Plaintiffs' case in chief, various motions for a directed verdict were heard and denied by the Court. At the conclusion of the day on June 7th, the parties agreed to allow the Court to call a recess until June 14th, to allow one juror to attend work training in California.

On June 14th, Mountain Enterprises, Inc. began its case in chief calling Claudia Garnet Wheeler to the stand. Following Ms. Wheeler, Mountain Enterprises, Inc., called Rick S. Johnson and David A. Stopper. On June 15th, Mountain Enterprises, Inc. called Robert K. Tinney. Following the testimony of Mr. Tinney, Mountain called its Co-Defendant, Billy Kirk. At that point, due to various problems with the Courthouse electrical system, and in obtaining a court reporter, the trial was not continued until June 19th. On June 19th, Mountain Enterprises, Inc., called Leonard Lawson followed by Roger Griffith. At that point, Mountain

Enterprises, Inc., closed its case, while reserving the right to call an additional one or perhaps two witnesses.

On June 21st, Defendant Jerry Galloway, d.b.a. Galloway Trucking, opened his case in chief and called to the stand Defendant, Jerry Galloway. Following Mr. Galloway's testimony, Mr. Galloway called Charlie White as a witness. Following Mr. White's testimony, Mr. Galloway closed his case in chief. At that time, Defendant, Billy Kirk, informed the Court that he had no additional witnesses to call.

On June 22nd, Defendant, Billy Kirk, opened his case in chief by calling Erma Collier to the stand. After Ms. Collier's testimony, Billy Kirk closed his case in chief. Also on June 22nd, Mountain Enterprises called its additional witness, Camron Lewis. Following this testimony, Mountain Enterprises, Inc., closed it's case-in chief.

On June 25th, Plaintiff's called a rebuttal witness, Jason Price, whose testimony was heard in camera by the Court. The Court then allowed Mountain Enterprises, Inc., to reopen its case in chief, in order to call Dan Cooperridder. Following Mr. Cooperridder's testimony, and Mountain Enterprises, Inc., reclosing its case in chief, Plaintiffs' rebuttal witness, Jason Price testified to the jury.

At the close of evidence, various motions for a directed verdict were made, and the Court denied all of them. On June 27th, the Parties made their closing arguments, and the case was submitted to the jury for a verdict. They returned a verdict in favor of the plaintiffs, as follows:

> 1. On the issue of Compensatory Damages to the Estate of Harley Fitch:
>
> A. Loss of income of the decedent: $1,300,000.00
>
> B. Loss of services, protection, care and assistance provided by the decedent: $150,000.00
>
> C. Compensation for sorrow, mental

anguish and solace: $1,500,000.00

D. Reasonable funeral expenses $9,214.16

TOTAL OF COMPENSATORY
DAMAGES FOR HARLEY FITCH $2,959,214.16

2. On the issue of Compensatory Damages to the Estate of Tyler Fitch:

A. Loss of income of the decedent: $1,300,000.00

B. Loss of services, protection, care and assistance provided by the decedent: $150,000.00

C. Compensation for sorrow, mental anguish and solace: $1,500,000.00

D. Reasonable funeral expenses $9,214.16

TOTAL OF COMPENSATORY
DAMAGES FOR TYLER FITCH $2,959,214.16

3. On the issue of Punitive Damages:

A. Against Billy D. Kirk: $10,000.00

B. Against Jerry Galloway individually and doing business as Galloway Trucking:

1. for explicitly or implicitly authorizing or ratifying the actions of Billy D. Kirk: $50,000.00

2. for his own individual acts or omissions: $50,000.00

C. Against Mountain Enterprises, Inc. doing business as Lenore Asphalt, Inc::

1. for explicitly or implicitly authorizing or ratifying the actions of Jerry Galloway and/or Billy D. Kirk: $6,000,000.00

2. for its own individual acts or omissions: $6,000,000.00

The jury awarded a Plaintiffs a total of eighteen million, twenty eight thousand, five hundred fifty eight dollars and fifty seven cents ($18,028,558.57).

On August 29th, this Court held a hearing to review the award of punitive damages, in accordance with Garnes v. Fleming Landfill, Inc., 186 W. Va. 6556, (1991). On December 21st, 2001, this Court entered an Order on the review of punitive damages, upholding the jury's verdict, and finding that it was proper. Accordingly, this Court hereby makes the following findings of fact and conclusions of law:

FINDINGS AND CONCLUSIONS

1. That all findings of fact and conclusions of law from this Court's Order regarding the review of punitive damages in this case, entered on December 21st, 2001 are hereby incorporated by reference;

2. That the jury's verdict as outlined above is just and proper and shall be entered as the final judgment in this case; and

3. That therefore, the Court enters judgment in favor of the Plaintiffs, in the amount of eighteen million, twenty eight thousand, five hundred fifty eight dollars and fifty seven cents ($18,028,558.57).

All of which is hereby ADJUDGED, ORDERED and DECREED.

The Clerk of this Court is hereby Ordered to provide a certified copy of this Order to all parties and counsel of record, by USPS First Class Mail, hand delivery or telefax communication.

Entered this /31st/ day of January, 2002 A.D.

[Stamped by Clerk as duly entered Feb. 1, 2002]